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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 157

EDWARD M. WINSTON,
Petitioner,

vs.

COUNTY OF COOK, a Municipal Corporation of the State of Illinois, and WILLIAM J. TUOHY, Successor State's Attorney,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

There heard on appeal from the Circuit Court of Cook County.

PETITION FOR WRIT OF CERTIORARI.

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CONSTITUTION AND STATUTES.

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PETITION FOR WRIT OF CERTIORARI.

Edward M. Winston, prays that a Writ of Certiorari be issued by this Court to review the decree of the Supreme Court of Illinois, rendered March 11, 1948, affirming a decree against your petitioner entered by the Circuit Court of Cook County of Illinois, dismissing his amended answer and counterclaim that were filed April 11, 1947.

The opinions by the Supreme Court of Illinois are reported as follows: first appeal 358 Ill. 146: Second appeal

384 Ill. 287; and third appeal 399 Ill. 111. The opinion on first appeal has some value as recital, but none whatever as decision; because after remand to the Circuit Court, the State's Attorney filed extensive amendments to his Information in Chancery (Tr. 16-20); which are part of the record on the third appeal. The opinions on second and third appeal are printed as an appendix to this petition. For emphasis we have used some italics. Page 52ff.

One complete record here.

The opinions by the Supreme Court of Illinois in this case, make reference to some records of other cases which were decided at the same time as the first two appeals. That fact does not make those cases of any importance upon this review. The court records of those cases were and remain separate and distinct at all times. Whatever was said about those cases is not pertinent. The record brought here from the Supreme Court of Illinois by Winston is complete for this review.

There has never been any trial by evidence in this record

Decree and Opinion, for Review.

The Illinois courts held as invalid and of no avail a formal record for legal services, between your petitioner, an attorney at law, and the County of Cook, State of Illinois. Both courts thereby denied all rights of your petitioner and held adversely to your petitioner upon Federal questions, based on the Constitution of the United States and hereinafter more fully set forth.

Preliminary Statement.

This case arose from an effort to solve the delinquent tax confusion in Cook County (including Chicago) Illinois

in the 1930's. At that time tax delinquency was so complete that funds were lacking for the operation of any local government. Public financing became impossible. Chicago and Cook County were suffering from the worst tax delinquency in their history. The staff of attorneys available to the State's Attorney were all needed to attend to his duties about crime. Upon the request of the State's Attorney then in office, and because of the vast amount of tax delinquency, the Board of County Commissioners of Cook County sought assistance by employing private citizen attorneys to institute legal actions to collect delinquent taxes through the regular processes of the Courts. Payment was entirely contingent upon collection. Edward M. Winston was so employed.

By the Constitution of Illinois special provision is made for Cook County, through the County Board shall manage the County affairs of Cook County, and govern employment for that County, other than elected officials. By acts of legislation passed under that Constitutional warrant and placed of public record in Cook County, Winston was so employed as a special attorney, under direction of County Board, to procede at court to collect delinquent real estate taxes.

The employment of private attorneys by the County Board for civil litigation in Cook County has been a constant practice since the Constitution was adopted in the year 1870. That practice and usage has continued while this suit has proceeded against Winston, the Cook County Appropriation Bill for the year 1948, (a public act of which all Courts take judicial notice per statute) shows appropriations for the State's Attorneys staff $818,919.92, and shows separate therefrom and in addition thereto more than $118,600 of appropriations for *"outside special attorneys"* and similar legal services. See page 48.

After Winston had pursued this legal employment for about two years, and by civil litigation in the court had caused the collection and payment of more than $16,500,000 into the hands of the County Treasurer, a newly elected State's Attorney of Cook County filed this suit to stop payment to Winston for his legal services so rendered about public tax business. Winston asks recovery only for what legal services he had completed before this suit was filed, and before employment was ended and recalled by the County Board.

Federal Questions.

The major Federal questions in this case are:

Whether the Illinois Courts by applying the precedural fog which is disclosed by this record, deprive Winston of substantive and procedural vested rights that are granted to him by Articles 2 and 10 of the constitution of Illinois and by Amendment 14 to the constitution of the United States. There has not been any trial with evidence heard in this suit, originally filed in chancery by the State's attorney of Cook County. There have been three appeals at long intervals upon the pleadings and questions of law.

The stand of Winston is that the ruling on the third appeal violates his basic rights, not only under the Illinois Constitution but also violates the Federal Constitution, by denying to Winston due process of law and equal protection of law. Although a new and separate and distinct cause of action is set forth by this 1947 amended answer and counterclaim for Winston, and that pleading is prosecuted by the third appeal (by new counsel), the Supreme Court of the Illinois denies to petitioner relief, on the ground that the former appeals are res judicata of all rights, even though not pleaded nor before the courts.

Petitioner contends that the courts of Illinois, contrary to usual and normal procedure in civil actions in Illinois, seized upon general language lifted from its former opinion thereby departing from the record before it, and held that the earlier appeals estopped Winston from pursuing a new and independent cause of action and theory of law upon the new matter and its independent cause of action.

Whether an employment made by a County upon its public records in good faith, by County legislation, between a practicing attorney and the County, providing for fees and reimbursement to the attorney for legal services and expenses paid out by him in rendering legal services in the courts for the collection of taxes on real estate, is valid and enforceable, and is protected by the Constitution of the United States?

Whether destruction by a State Court of such employment is forbidden by those provisions of the Constitution of the United States which prohibit impairment of contracts; which prohibit *ex post facto* laws and decisions of States; which prohibit the taking of vested and established contract rights or other private property; which prohibit the taking of private property for public use, and which prohibit a State from denying to the citizen the equal protection of the law, on any grounds whatever?

Whether the license and franchise held by Winston for over fifty years to practice law and thereby earn a livelihood for himself and family, may be substantially changed in scope by sudden decision by Supreme Court of Illinois to reverse the established law of Illinois whereunder private attorneys had been employed by counties for all manner of civil and tax litigation, pursuant to definite authority shown since 1870 by the Constitution as to Cook County, and by many decisions of Illinois Courts?

The foregoing Federal questions are of such general public importance, and are particularly of such grave personal importance to your petitioner, that they should be reviewed by this Court. Particularly is that so because the rulings made by the courts of Illinois on this record seem to be in clear conflict with decisions and rulings previously made by this Court.

Petitioner is advised that said rulings made by the Supreme Court of Illinois on this record, probably are in conflict with prior rulings made by the Supreme Court of Illinois and by this Court:

Res judicata is not a defense.

Where the opinion on former review discussed issues beyond the pleadings and outside the issues of law then of record before the court *Abrams* v. *Awotin*, 388 Ill. 42 at 48.

Where the issues of law on former review were narrower than those made by the pleadings on second review.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413 at 426.

Where several issues of law were decided on former review *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506 at 519.

Where the charter of corporation has been renewed since first review *Third National Bank of Louisville* v. *Stone*, 174 U. S. 32.

Where validating legislation was enacted since former decision *Steele County* v. *Erskine*, 98 F 215 affirming 87 F 630.

Where former decision did not rule upon an applicable statute which is relied upon by the second review.

Mellon v. *St. Paul Ry.*, 11 F2d 332 and *Mellon* v. *New York Central Ry.*, 11 F2d 335 with certiorari denied 271 U. S. 678 and 679.

Where on second review a different bundle of rights are urged with relation to the same facts about which no contest was made.

Commissioner of Internal Revenue v. *Sunnen*, 333 U. S. 391 at 601.

Ohio National Life Insurance Co. v. *Board of Education etc.*, 387 Ill. 159 with certiorari denied 323 U. S. 796.

Ptacek v. *Coleman*, 364 Ill. 618.

Where the former review pursued a legal claim that never existed.

Orminski v. *Hyland Electrical Supply Co.*, 326 Ill. App. 392 at 396, and the authorities there mentioned.

Hall v. *County of Cook*, 359 Ill. 528 at 540.

Even in Criminal cases, where the facts are the same, the doctrine of double jeopardy does not apply where crime theories are different.

People v. *Harrison*, 396 Ill. 463 and *People* v. *Flaherty*, 396 Ill. 304, 307.

On the first review the Supreme Court of Illinois overruled the demurrer by Winston and others to the Information in Chancery and remanded the record for further proceedings. At that time there was no answer nor counterclaim filed in the record. 358 Ill. 146.

On the second review the answer and counterclaim for Winston relied exclusively upon a supposed contract mentioned by the information in chancery by which the States Attorney had misled the attorneys for Winston as to the nature of the county public record. 384 Ill. 287. In the record at that time no mention was made by any party nor by any court, as to Section 10 of Article 10 of the Constitution of Illinois. Nor was any mention made of the rights

of Winston arising from that section of the Constitution. That state of the record is clearly shown by the language in italics in the opinion rendered by the Supreme Court of Illinois on the third appeal. Below at page 70.

New and distinct issues of law are presented for review by each of the three appeals. So that no claim of res judicata is possible.

The equal protection of laws is a pledge of protection of equal law:

State of Missouri ex rel Gaines v. *Canada*, 305 U. S. 337 at 350.

Winston has not claimed and does not claim to supersede any power of the State's Attorney of Cook County. His services were rendered pursuant to legislation by the County Board and pursuant to request by John A. Swanson, State's Attorney, and pursuant to public record with the County Board. Winston agrees that the County Board had authority to terminate his authority to render further services by new legislation by the County Board, which was done by County Board proceedings dated January 16, 1933. Winston seeks to recover for legal services rendered before that recall date.

Statement of the Case by Pleadings Information in equity.

Winston employment by Cook County was placed of record April 16th 1932 (Tr. 8) and was confirmed and extended by acts of record November 22, 1932 (Tr. 9). There was full performance by Winston under this employment until this suit was begun.

At an election held in November 1932, Thomas J. Courtney was elected as State's Attorney for Cook County, Illinois. In December 1932 (as successor to John A. Swanson)

he entered upon the duties of that office. An information in the nature of a bill in equity for injunction was filed July 22, 1933, by "Thomas J. Courtney as State's Attorney for the said County of Cook for the people of the State of Illinois, and in the name and by authority thereof, and on the relation of himself as a resident and taxpayer of said County of Cook in behalf of himself as such taxpayer and other taxpayers of said County similarly situated." (Tr. 1.) An amended Information and thereafter a second amended Information were filed (Tr. 2-16). Winston and all members of the County Board, defendants named in said Informations, filed demurrers which were sustained by the Circuit Court by order entered December 15, 1933. The State's Attorney elected to stand upon said amended Information and thereupon the same was dismissed.

Decision on First Appeal.

By opinion on the first appeal (*People ex rel Courtney* v. *Ashton*, 358 Ill. 146, 148) that Supreme Court stated the substance of the Information as follows:

> "The people of the State of Illinois, on the relation of Thomas J. Courtney, State's Attorney of Cook County, and on his relation individually as a resident and taxpayer of that County, filed in the Circuit Court of Cook County two Informations against the members of the Board of Commissioners of Cook County, the County Treasurer, the County Clerk, and certain attorneys therein named, as defendants, seeking to enjoin the payment to the attorneys of county funds under alleged contracts entered into between the County Board and those attorneys.
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> "The Informations averred that Courtney is the State's Attorney of Cook County, and that on the 22nd day of May, 1931, and on June 6, 1932, the Board of Commissioners, without power or authority, went through the form of passing resolutions which are set

> out in the Information, attempting in case No. 22412 to employ Henry M. Ashton and others to prosecute suits and collect delinquent real estate taxes and to authorize him to appear on behalf of and represent the people of the State and the County of Cook as attorney and solicitor, and fixed his compensation on a contingent basis. By amendment Edward M. Winston was substituted for Ashton. * * *The Informations allege that these contracts were *ultra vires* the power of the board and null and void. * * *

And that Supreme Court stated the defense as follows:

> "The defendants (Ashton-Winston-and all members of the County Board) filed a general and special demurrer to each of the Informations, which demurrers were sustained, and, plaintiff in error abiding the Informations, they were dismissed." (P. 149.)

On that first appeal the cause was reversed by Supreme Court of Illinois, in the case of *People* v. *Ashton*, Cause 24212, and remanded to the Circuit Court of Cook County, with directions to overrule said demurrer (Tr. 24). Thereafter Thomas J. Courtney on April 19, 1935 filed his amendment and supplement to the aforesaid amended Information (Tr. 16-20).

Challenge by State's Attorney to Winston employment.

By said various Informations Thomas J. Courtney as said informant sought to have declared *ultra vires*, as contracts certain agreements employing Winston as attorney and counsellor-at-law, to prepare and file and prosecute before the Circuit and Superior Courts of Cook County, civil suits and proceedings to collect delinquent taxes, interest and penalties due on real estate in Cook County.

Winston filed in 1942 first answer and counterclaim to said Information so amended and supplemented, and informant Courtney filed his motion to strike said answer and

counterclaim on October 9, 1942 (Tr. 11). That motion was sustained by the Circuit Court of Cook County, and a decree was entered. Said Winston abided his said answer and counterclaim, (Tr. 22.) On second appeal that order was affirmed. See below page 52.

How the Issues were Decided on Second Appeal.

On October 23, 1942 the Circuit Court of Cook County sustained the motion of the State's Attorney to strike Winston's answer and counterclaim, and found as matter of law that the contracts are void; for the reason asserted that the County Board had no power or authority to contract with Ashton or Winston to perform the legal services, as set forth in the aforesaid resolutions adopted by said Board of Commissioners; on the ground that the sole and exclusive power to commence and prosecute suits and proceedings for the recovery of delinquent taxes and interest and penalties, is vested in the State's Attorney of Cook County. The decree then dismissed first counterclaim filed by Winston and ordered that the County of Cook go hence without day (Tr. 49). That decree was affirmed by the Supreme Court of Illinois and rehearing denied November 11, 1943. (Tr. 21) and the cause was remanded, for the second time to the Circuit Court of Cook County. That ruling did not dispose of the suit. By mandate and by order of reservation it remained pending in the trial Court of Cook County.

That opinion by the Supreme Court of Illinois, which was filed on September 23, 1943, expressly names and repudiates its own prior decisions and interpretations of the Constitution and Statutes of Illinois (384 Ill. page 300). Upon those solemn decisions your petitioner and Cook County had acted and performed under legislation and the Constitution. Those prior decisions and interpretations will be mentioned, and are discussed at pages 18, 28, 30, 36 to 48.

Amended Answer and Counterclaim by Winston.

While the suit was thus pending and on April 11, 1947, Winston filed an amended answer and counterclaim. This was consistent with Section 46 and other sections of the Civil Practice Act of Illinois. And was authorized by historic practice and procedure in equity in Illinois and the unvarying decisions of Illinois Courts before that date in all other cases. This new pleading stated a new cause of action for Winston based upon legislation by the County Board of Cook County Illinois. This cause of action was new in theory and partly in statement of facts. This new cause of action had never been in the case nor before any court prior to the present record and the current appeal (Tr. 23-30).

Winston by his pleading filed April 11, 1947 denies that said acts of the County Commissioners were *ultra vires* the power of the Board, and denied that his legal services are null and void, and denies that at the time of the acts referred to no appropriation therefor was previously made, but on the contrary says that there were a number of appropriations made by the County Board during the first quarter of the then fiscal year which were applicable to Winston and that said employment was made with full power and authority of law and constitution.

The 1947 answer and counterclaim further says that Winston in good faith put in many months of arduous professional legal labors both on the part of himself and of others under his supervision and to whom he is liable and expended large amounts of money and filed 818 suits for the collection of such delinquent taxes, penalties, costs and for the foreclosure of liens for such delinquent taxes and paid to the County moneys so collected or caused to be collected, aggregating more than Sixteen Million Dollars (358 Ill. 149). That there is due for his services substantial compensation (Tr. 29.)

That 1947 answer and counterclaim further says that the County received the benefit of said labors and expenditures by Winston and that the County of Cook and the Board of Commissioners and said Courtney and the State's Attorney are and each of them is and should be overruled from asserting or claiming that the legal services are invalid or that he, Winston, is not entitled to receive compensation therefor.

That 1947 answer and counterclaim further says that the members of the County Board took counsel with then County Attorney for Cook County, with John A. Swanson who was then State's Attorney, and with the Honorable Denis E. Sullivan, who was then one of the Judges of the Superior Court of Cook County, and other able advisors. That each of them advised the County Board that the employment was valid and legal and proper. That the County Board acted upon such legal advice in entering into the employment with Winston.

Ruling on Third Appeal.

The fact allegations set forth by the 1947 amended answer and counterclaim of Winston (being admitted as true by the State's Attorney motion to strike) were the pleading theory and background of this case on the third appeal, taken to review an order of dismissal (R. 32).

Likewise on the third appeal the 1947 pleading by Winston was dismissed (Tr. 32), and that order confirmed. See Opinion at page 66 below.

In the Supreme Court of Illinois, these Errors Were Relied Upon for a Reversal of the Decree of the Trial Court.

In the courts below Winston asserted there was denial of his federal rights by sudden departure from established law, upon which he had relied when accepting and performing his special employment by Cook County as an attorney and counsellor at law.

(a) The court acted contrary to the Constitution and prior decisions as herein stated, in not sustaining the validity of the employment here involved, and erred by ordering and decreeing that said answers by Winston be stricken and that his counterclaims be dismissed.

(b) The trial court acted contrary to the Constitution and prior decisions as hereinstated, in holding that the undertakings set forth in the legislation adopted by the Board of Commissioners of Cook County were beyond the power of said County Board, established by sections 10 and 7 of Section 10 of the Constitution of Illinois.

(c) The trial court acted contrary to the Constitution and prior decisions as herein stated, in holding that the County of Cook was not liable for the services rendered and those moneys expended by Winston, in performing legal services under agreement with said County Board of Commissioners, pursuant to the Constitution.

(d) The trial court acted contrary to the Constitution and prior decisions as herein stated, in not holding that the County of Cook was estopped, after receiving the benefit of the services rendered and the money expended by Winston in performance of said employment from refusing to pay for such services and moneys so expended upon its order and request.

(e) The Illinois Courts departed from the established law of Illinois by ruling against vested rights of property earned by legal services by Winston, and by ruling that claim of res judicata could be applicable to his amended answer and counterclaim. As shown by the record, the Illinois courts have acted by arbitrary discrimination against the petitioner Winston to take away his property.

Statement as to Jurisdiction in this Court.

The assignment of errors in the record filed before the Supreme Court of Illinois, and the petitions for rehearing in that Court summarize the Constitutional and Federal questions presented to that Court and to the Circuit Court of Cook County. There was impairment of property rights vested in your petitioner; and denial of due process of law for protection of said vested property rights, and denial to your petitioner of equal protection and denial of equal application of law. Petition for rehearing on third appeal was denied by the Supreme Court of Illinois on March 11, 1948. Upon an application to this Court for an extension of time to file this petition, an order was entered in this Court, extending the time. Timely application for review by this Court is made by filing this petition for writ of certiorari. This petition is presented in accordance with section 237 (b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

Upon each appeal (1934 and 1943 and 1948), your petitioner Winston contended before the Supreme Court of Illinois, that the law to govern this case was thoroughly settled by Constitution and by prior statutes and earlier decisions of the Supreme Court of Illinois. On the first appeal (taken by the State's Attorney of Cook County) the Supreme Court of Illinois said:

> "A construction of the Constitution is involved, and so, regardless of argument pertaining to other elements of jurisdiction, this Court has jurisdiction, and the motion to transfer will be denied."

That Court at that time (October 24, 1934) reversed the dismissal order that had been entered against the State's Attorney suit by the Circuit Court of Cook County, and remanded the case to that Court. There being no final order until March 11, 1948 this record could not sooner be

brought before this Court for review. *Georgia Ry. and Power Co.* v. *Decatur,* 262 U. S. 432. Winston sought a review in 1944 as No. 768 but certiorari then was premature.

The amended answer and counterclaim were filed thereafter in the trial Court on April 11, 1947. The present appeal was taken in the year 1947 to the Supreme Court of Illinois, by your petitioner.

In *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, at page 450, this Court quoted Section 237 of the Judicial Code as amended February 17, 1922, reading as follows:

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon a writ of error, re-examine, reverse or affirm the final judgment of the highest court of a state, in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

With reference to that amended statute, the opinion by Your Honors in the *Tidal Oil Company* case, at page 455, made the following ruling:

> "It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

The petitions for rehearing on each appeal in the instant case were denied by the Supreme Court of Illinois without any written opinion thereon.

There were more than sixty years of Illinois court decisions interpreting the Constitution and the statutes of Illinois in accord with pleading by Winston and *before the employment was made between the petitioner and Cook County.*

Departure from Established Law.

Winston comes here with the record wherein the Supreme Court of Ilinois, by its three opinions and ruling in this case, for the first time, makes departure from the rulings by itself and the Appellate Court of Illinois, as to the established meaning and effect of the constitution and statutes of Illinois, as disclosed by many decisions over a period of more than sixty years, prior to the time that the legislative action by the County Board of Cook County was enacted and the employment was entered into with this petitioner in the year 1931 (Tr. 2-9).

The decisions by the Supreme and Appellate Court of Illinois during said sixty years, before this employment was made, necessarily became an established part of the statute and constitution of the State of Illinois, many decades before this employment was entered into by petitioner and Cook County, relying thereon. During all of these years and to this date, the legislature of Illinois did not change that meaning and construction of said statutes of the State of Illinois. The sudden departure by the Supreme Court of Illinois, in the instant case, is not a construction or interpretation of the statute and the constitution, but is in fact nothing more or less than outright judicial legislation, and an outright seizure by the court of power belonging to the People of the State of Illinois, and is arbitrary denial of federal constitutional rights vested in your petitioner as herein stated.

There is even stronger confirmation and independent

continuous assertion by the legislature of Illinois, in its special law for appointments to office by Cook County Commissioners, enacted June 15, 1893 Revised 25, 1913, Chapter 34, Section 64, Fortieth and Forty-third. These laws were re-enacted July 21, 1941 and July 15, 1943, as Sections 64:29 and:17 (Chapter 34 Smith-Hurd 1947) Continuously since June 15, 1893 this Illinois Statute has provided for "*the county attorney, the county architect,* the committee clerk of the County Board, the county purchasing agent" and other employees to be appointed by the County Board.

Without need to rely upon that statute, the Supreme Court of Illinois *reversed the trial and Appellate Courts of Illinois,* and ordered the County of Cook to pay the County Architect, as an exercise of County power and duty under Article 10 of Constitution of Illinois 1870.

Hall v. *County of Cook,* 359 Ill. 528.

It is arbitrary denial of equal protection of law, impairment of executed empolyment, a taking of vested property by judicial act *ex post facto* without benefit of purchase by eminent domain, and a denial of due process of law, for the Supreme Court and Circuit Court of Illinois, to rule against petitioner whose position is indistinguishable from that of said County Architect.

These Cases Support Federal Jurisdiction.

Commissioner of Internal Revenue v. *Sunnen,* 68 S Ct. 715 at 721.: 333 U. S. 591 at 601:

> "But if the relevant facts in the two cases are separable, even though, they be similar or identical, collateral estoppel does not govern the legal issues which recur in the Second case. Thus the Second proceeding may involve an instrument or transaction identical with but in a form separable from, the one dealt, with in

the first proceeding. In the situation a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result, or, if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decises. Before a party can involve the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding *must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.*"

By the petition for rehearing for Winston, we have shown an entirely *new bundle of legal principles* is presented by later Amended Answer and counterclaim.

Likewise you took jurisdiction in the case of *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358; 53 S. Ct. (1932) 145 at 149;

"* * *The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. *This latter objection the petitioner could not make in advance of the event.*"

And again you gave relief to petitioner in the case of *West Chicago Street Ry. Co.* v. *Illinois ex rel Chicago*, 201 U. S. 506 at 519-520:

"We come now to consider the questions arising on the record and discussed at the bar.

"The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United States,—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause

of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, B. & Q. R. Co.* v. *People* (*recently decided*) 200 U. S. 561, 596, 20 Sup. Ct. Rep. 341."

And again this Court enforced the Constitution *Home T. & T. Co.* v. *Los Angeles,* 227 U. S. 278 at 290 and 291:

"In *Ex parte Virginia,* 100 U. S. 339, L. ed. 676, 3 Am. Crim. Rep. 547, the case was this: A judge of a Virginia county court was indicted under the civil rights act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of habeas corpus and a writ of certorari to bring up the record, and a like petition was presented on behalf of the state of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the 14th Amendment. The ruling in *Virginia* v. *Rives* was reiterated, the court saying:

" 'They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due*

process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it.'

"Answering the claim that there was no power to punish a state judge for judicial action, and therefore that the charge made was not within the 14th Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority, but a mere abuse thereof; and that it was 'idle' under such circumstances to say that the offense was not within the Amendment (p. 348).

"In *Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567, a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the Amendment, the language which we have quoted from *Ex parte Virginia* being reiterated.

"In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the 14th Amendment. The court, reiterating the doctrine of *Virginia* v. *Rives* and *Ex parte Virginia*, held that this conclusion was sustained from a two fold point of view,—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers."

In the case of *Torao Takahoshu Fish and Game Commission*, 68 S. Ct. 1138 at page 1143 your Honors ruled June 7, 1948.

"The fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any State' on an equality of legal privileges with all citizens under non-discriminatory laws."

An Act of State Attempted by Illinois Court.

If State Courts are not forbidden by federal Constitution to do what Illinois Courts have done in this record, then it follows that any State Court may dispossess and destroy the property rights of any person as against any municipality or State. That will be true no matter what has been the prior decision, or the prior statute, or the prior State Constitution; and no matter how long may be the course of action of the municipality or State upon which the person relied, as basis for his contract and franchise and property right vested in such person, before the new decision shall announce the departure and new statement of law. In short if this record is allowed to stand we are not merely on the road, but we have already arrived at the time when the European Doctrine of "Act of State" has been fully adopted in this country. Under this new theory made effective by the rulings in this record, the citizen is no longer citizen under the Constitution. He is *subject* to the *will* of current government. The shield and protection of the Constitution are removed.

Prayer For Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme court of Illinois take away his *earned* property right by arbitrary and capricious decision. That action was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays the allowance of writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

Weightstill Woods,
Counsel for Petitioner.

Supporting Brief For Petitioner.

The license and franchise held by Winston as an attorney and counsellor at law for more than fifty years, to practice law and thereby to earn a livelihood for himself and family is a vested right which supports his claim for recovery at court.

Nixon v. *Herndon*, 273 U. S. 536 at 540.
Coleman v. *Miller*, 307 U. S. 433 at 469.
Lasdon v. *Hallihan*, 377 Ill. 187 at 195.

The Constitution of Illinois vests the legislative sovereignty over the County affairs of Cook County in "The Board of County Commissioners of Cook County" by *two* special sections of that constitution.

Section 10 and 7 of Article 10, Constitution of 1870.

On the contrary however, in the other 101 Counties of the State, the affairs of such County may be transacted in such manner as the General Assmebly may provide.

Sections 5 and 6 of Article 10, of Constitution 1870.

That sovereign legislative power is co-ordinate with and beyond the jurisdiction of every Court and State's Attorney and the Legislature of Illinois.

Article III, Constitution of Illinois, 1870.
Cummings v. *Smith*, 368 Ill. 94, 103.

Ottawa Gas-Light & Coke Co. v. *People,* 138 Ill. 336, 343.
People v. *Czarnecki,* 265 Ill. 489.
Kreeger v. *Zender,* 332 Ill. 519.
Helliwell v. *Sweitzer,* 278 Ill. 248.

This Court will take judicial notice that the population of Cook County is more than four million people and more than half the population of the State of Illinois.

By sovereign acts of legislation, which are shown by this record, the County Board of Cook County, expressly authorized the 818 civil tax litigations which were conducted by petitioner Winston, in courts of record in Cook County, and also authorized said employment, which was made with the express approval in writing by John A. Swanson, then State's Attorney of Cook County (Tr. 7).

County proceedings at pages and dates herein mention-4-27-32 page 1207—12/5/32 page 60, 68—12/12/32 page 74 (Tr. 2ff).

Cummings v. *Smith,* 368 Ill. 94, 103.

Said legislation directs and empowers Winston to perform legal services and administrative action at court. That action every attorney and counsellor-at-law is authorized by his license from the Supreme Court of Ilinois, to carry on at the request of the client who has control over such litigation. The *preparation and conduct of CIVIL litigation of court for Cook County as client,* is not in any sense of the term any act of sovereignty, and does not involve any essential power vested in the State's Attorney of Cook County by the Constitution of Illinois.

Chapter 13, Section 1, Illinois Revised Statutes
Article 6, Section 22, Constitution of Illinois 1870.
Ottawa Gas Light & Coke Co. v. *People,* 138 Ill. 336, 343 (1891).

Howard v. *Burke*, 248 Ill. 224, 228 (1910).
Wilson v. *County of Marshall*, 257 Ill. App. 220, 223 (1930).
People v. *Straus*, 266 Ill. App. 95 (1932; Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

The Statutes of Illinois *pertaining to revenue* for all taxing bodies (chapter 120 to Illinois Revised Statutes), specifically confirm the power of *the County Board and no one else* to manage and conduct all litigation *for collection of delinquent taxes* by court proceedings.

Illinois Revised Statutes as amended June 17, 1917, Chapter 120, Sections 230, 253, 254, 156 to 161, 183, 255, 292.
Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343.
Article III, Constitution of Illinois 1870.

The Statute is specific that the *County Board* means "The Board of County Commissioners of Cook County," Chapter 120, Section 292.

The County Board has control of many funds that are applicable to payment for legal services under employment, in addition to penalties and taxes exceeding Sixteen Million Dollars, cash funds collected and paid into the County Treasury by efforts of petitioner.

Section 705, Chapter 120, Ill. Rev. Statutes.
People v. *Kowoleski*, 310 Ill. 498, 501.
Tearney v. *Harding*, 335 Ill. 123 at 128.

No tax statutes which name the State's Attorney as an enforcing officer were ever effective as to this case. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act Laws of 1935, page 1168. All suits and acts by Winston were before that date. And that law was expressly repealed by the present Revenue Law approved May 17, 1939. The "State's Attorney" was named

as enforcing officed in the delinquent Tax Act dated July 26, 1939,, a' Section 6, and also in the delinquent Tax Act July 10, 1941, at Section 6, but these laws are limited to counties with a population *less than* 500,000 *people;* they were never applicable to Cook County.

The State's Attorney of Cook County is referred to in the County Assessors Act, Laws of May 15, 1933, Section 46. But prior to enactment of Section 1 of act of July 24, 1943, the State's Attorney of Cook County is not mentioned anywhere in the Revenue Act of Ilinois. All suits and acts by Winston were *before* any of these dates.

C. C. & N. Co. v. *Louisiana*, 233 U. S. 362 at 376-378.

There was no common law "State's Attorney." There are no common law powers of State's Attorney. The State's Attorney provided for by the Constitution of 1870 of Illinois, was a new office. Constitution does not specify any duties of that office, only statutes do that.

Revised Statutes of Illinois 1845, Chapter 12.

Constitution of Illinois 1870, Article VI, Section 22.

Neither the State's Attorney nor any one else has any power whatever to conduct civil litigation about *collection* of delinquent taxes, separate and apart from said specific statutes which vest in the County Board, authority to initiate and conduct all such litigation.

People v. *Biggins*, 96 Ill. 481 (1880).

Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343 (1891).

Wilson v. *County of Marshall*, 257 Ill. App. 220, 223 (1930).

People v. *Straus*, 266 Ill. App. (1932); Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

Only the County Board may authorize the office or employment of an assistant State's Attorney or Special Attorney. Only the County Board may provide compensation for such office or employment or personal service.

Dalby v. *People*, 124 Ill. 66 at 75.
Section 64 Fortieth, Chapter 34; Ill. Rev. Stat.
Section 18, Chapter 53, Illinois Revised Statutes.
Section 24, Article V, Constitution of Illinois.
People v. *Hanson*, 290 Ill. 370, 373.
Lavin v. *Board of Commissioners*, 245 Ill. 496, 530ff.
Tearney v. *Harding*, 335 Ill. 123, 127.

The primary duty is obligatory upon all courts, both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).
Conway v. *Cable*, 37 Ill. 82 at 90.
West Chicago Street Railway Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506 at 519-520.
Coombes v. *Getz*, 285 U. S. 434.
Coleman v. *Miller*, 308 U. S. 433ff.

The orders of affirmance by the Supreme Court of Illinois are now final for purposes of review by this Court (Tr. 32).

Republic Natural Gas Co. v. *State of Oklahoma*, 68 S. Ct. 972 at 976ff.
Georgia Ry. and Power Co. v. *Decatur*, 262 U. S. 432.
Central Union Telephone Company v. *City of Edwardsville*, 269 U. S. 190.
C. C. & N. W. Co. v. *La.*, 233 U. S., 362 at 372.

Said orders are void and outlaw because they seek to destroy property rights of your petitioner (including his license and franchise as attorney and counsellor at law), which are well pleaded and shown by this record to be vested before this suit was begun by Thomas J. Courtney on July 15, 1933.

Commissioner of Internal Revenue v. *Sunnen,* 68 S. Ct. 715 at 721; 333 U. S. 491 at 601.

People ex rel Eitel v. *Lindheimer,* 371 Ill. 367, 308 U. S. 505 and 636.

Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398 at 431.

By decisions of Supreme Court of Illinois, through all the decades prior to the judgment and decree now appealed from, the Constitution and Statutes as to powers of County Board and duties of State's Attorney as to civil litigation, have always sustained the sovereign power and legislative actions of the County Board.

These sovereign acts of legislature have provided for employment of and for payment of County Attorneys, Assistant State's Attorneys' and Special Attorneys, to attend to all manner of civil litigation authorized by counties in Illinois, independent of any action therein by the State's Attorney of such a County. As a contemporaneous construction, such legislation and administration is binding upon all branches of the government of Illinois.

Cook County Budget for 1931 and prior years.

Ottawa Gas and Light Co. v. *People,* 138 Ill. 336-343 (1891).

County of Franklin v. *Layman,* 145 Ill. 138; affirming 43 Ill. App. 163.

Cook County v. *Healy,* 222 Ill. 310, 317ff (1906).

Howard v. *Burke,* 248 Ill. 224 at 228 (1910).

Galpin v. *City of Chicago,* 269 Ill. 27 at 41 (1915).

Tearney v. *Harding*, 335 Ill. 123 at 127 (1929).
People v. *Straus*, 266 Ill. App. 95 (1932); Affirmed by *People* v. *Straus*, 335 Ill. 640 (1934).

By contemporaneous construction such legislation and administration is binding in favor of Winston against all branches of the government of Illinois.

Cook County Budget for all years.
Nye v. *Foreman*, 215 Ill. 285 at 288 (1905).
Howard v. *Burke*, 248 Ill. 224 at 228 (1910).
Anderson National Bank v. *Luckett*, 64 S. Ct. 599, 651; 321 U. S. 233 at 244.
Hoyne v. *Danisch*, 264 Ill. 467.

And the Legislature of Illinois by Statute in 1912 and re-enactment in 1929 had reaffirmed all that court construction of statute and constitution for years before the Winston contract was made.

Section 18 of Chapter 53 and Sections 129 and 179 of Chapter 46, of Illinois Revised Statutes.

Since there has never been any hearing of evidence in this record, but all rulings have been made only on motions against pleadings by opposing party, there are no determinations of fact in the case. On May 13, 1948 the Supreme Court of Illinois adhered to their opinion in the case of *France* v. *Citizen's Casualty Co. of New York*, 79 N. E. 2d 28 at 30. That opinion reads as follows 400 Ill. 55 at 59:

> "The facts from which the foregoing conclusions have been deduced are not controverted and they did not present a question for the jury. Plaintiff's contention that the verdict of the jury determined the question of agency can not be sustained."

ARGUMENT FOR PETITIONER.

Summary Statement of Facts and Issues.

The County of Cook is the largest single county and local tax-collecting unit in the United States, since it includes not only the City of Chicago, but also considerable area outside that city, and has a population of over 4 million people. In the years 1931 and 1932, the County (for the reasons hereinafter set forth) had actually become insolvent and was unable for many months to pay the court judges and other officials, and was unable to pay its current debts, and even defaulted on the interest on its municipal bonds. This condition had been brought about by three grave emergencies:

1. The County of Cook and the City of Chicago (like other local governments in the United States) during those years was suffering in their tax revenues from the effects of the great financial depression of that period; and as a result the County (which is the constitutional tax collecting agency for the State and all other local governments within the County, including the City of Chicago) was confronted with a cumulating amount of tax delinquencies both as to real and personal property. These gross delinquencies by the end of the year 1930 had brought the threat of governmental disaster to the County.

2. The Legislature of the State and the State Tax Commission had previously ordered a so-called "Reassessment" of all real estate tax valuations in the County of Cook for the year 1927; and this "Re-assessment" had itself greatly increased the temporary insolvency of the County (and all local government units within the County, including the City of Chi-

cago), for the reason that the "Re-assessment" had taken more than 18 months longer to complete, than was contemplated or expected by the taxing authorities of the State and County; as a result of which no real estate taxes whatever were collected in the County during the period that such "Re-assessment" was being spread.

3. After this and during the years 1929 to 1932, it was (and is) a matter of common knowledge in Cook County that a so-called "tax strike" existed in the County whereby a large part of the real estate taxpayers completely refused to pay any taxes whatever until forced to do so by suits instituted for collection thereof, and the liquidation process of courts.

The record shows that as a result of these extraordinary tax conditions, the County and all of the local governments within the County (including the City of Chicago) were faced with bankruptcy; that the interest on their municipal bonds had been defaulted with the result that all of such bonds were badly depreciated on the financial markets, and the fiscal credit of the County and of each of such local governments was, for the time being, totally destroyed; while the thousands of municipal employees of the County and the other local governments were unpaid for months on end, and were for long periods of time continuously faced with what came to be known as "payless pay-days."

The record shows that the County Board of Cook County, under a special provision of the Illinois Constitution, is charged with the duty of "managing the affairs" of Cook County (Const. Art. 10, Secs. 7 and 10); and that the Statutes of Illinois make it the sole duty of the said County Board to enforce the collection of all property taxes, both real and personal, by suits in court if necessary.

The record shows that the County Board, being confronted with the severe tax emergency already indicated,

decided to correct that situation as rapidly as possible and for that purpose, as already indicated, entered into a formal record with your petitioner for the collection of such delinquent real estate taxes. That employment was fully considered and long debated by the County Board and was finally authorized and adopted by formal legislative action of the County Board (Tr. 2-9).

In view of its prime importance in this case, this sovereign legislative action of the County is set forth as part of State's Attorney's complaint in the trial court (Tr. 2ff).

The record shows that at the time of such legislative action by the County the general legal adviser of the County of Cook was then then duly elected and acting State's Attorney of the County, the Honorable John A. Swanson (Tr. 7).

The record shows that for a period of more than 60 years prior thereto, and ever since the adoption of the Illinois Constitution of 1870, *down to the inception of this suit, in July,* 1933, it had been the custom and practice and tradition for the County Board of Cook County to secure the aid and assistance of outside counsel and attorneys in the collection of taxes (in addition to the State's Attorney) whenever the County Board determined that such action was in the public interest. That custom and practice had been specifically approved by at least four prior decisions of the Supreme Court of Illinois; see pages 36 to 48.

Acting under such custom and practice and tradition, the County Board made the employment in question and the then State's Attorney of Cook County formally approved the legislative action of the County Board and officially approved the employment so made between the County and your petitioner (Tr. 7).

Your petitioner accepted and proceeded to set up a large clerical and auditing force to carry out its provisions. In due course petitioner instituted in court and pursued more than 818 separate and important real estate tax suits in the courts of the County and actually collected by force of those suits and paid over to the County treasury a total sum of delinquent taxes amounting to $16,522,470 plus.

Said federal questions are stated more factually as follows:

And whether a State Court of Illinois is forbidden by the Constitution to deny the validity of such a public record, between the County of Cook and Edward M. Winston, who is a resident of Illinois and duly licensed attorney and counsellor-at-law; the terms of which record authorize and direct said Winston, Attorney, to conduct and control litigation in said courts for the collection of taxes long delinquent in Cook County; his services to be performed under the supervision and management of the Board of Commissioners of said Cook County; the making of which public record was requested and approved in writing at the time of its signing, by the State's Attorney of Cook County then in office.

And whether the State Court in Illinois in denying the validity of such employment may disregard and overrule its own prior decisions, and may disregard the history and practice as to administration of such matters, and may repudiate accountings for his fees and outlays made in good faith between said County and Winston, Attorney, and whether said court may refuse compensation to said Winston, Attorney, for his proper services performed and completed, and may refuse to reimburse him for outlays in pursuance of said public record, all of which performance occurred before a later State's Attorney, who is now in office, and relying upon his own official authority, is seek-

ing by this injunction suit to stay further performance by said County of Cook, by denying compensation to Winston, Attorney, for services rendered in good faith before such adverse intervention; the legal services so completed by Winston having produced substantial returns of tax money (384 Ill. at page 295) to the treasury of said County of Cook and State of Illinois, during the severe financial distress which came to Municipal Corporations in Cook County during the 1930 years of depression.

Your petitioner particularly calls attention to the fact that the County of Cook, under the law, received (as compensation for its services and efforts of tax collection) all the so-called "penalties" collected from taxpayers, being additional sums due after default, which these suits conducted by Winston collected, over and above the taxes originally assessed. And your Petitioner also calls particular attention to the fact that his fees and compensation, under his employment, were not to be paid out of the general funds of the County, but depended entirely on and were to be paid out of such "penalties" as might be collected by him. In other words, the County itself was to make, and did make, a large profit out of the services of your petitioner; and your petitioner's fees were to be paid as a relatively small part of such profit to the County (Tr. 5).

Section 705, Chapter 120, Ill. Rev. Stats.

The records in this case and records of the County Treasurer show that your petitioner actually collected the sum of $3,546,443.70 as "penalties" on delinquent taxes, all of which sum went into the County treasury *as profit* to the County, as a result of the employment and legal services rendered by your petitioner.

New State's Attorney.

The record shows that in November, 1932, and about 18 months after your petitioner began work under the employment, a new and different State's Attorney was elected in Cook County, and that he was of a different political party from his predecessor. And your petitioner charges that this case has grown entirely out of that change in the personnel of the office of State's Attorney of Cook County. The assistant and successor of the same State's Attorney who was elected in November, 1932, is still in office at the time of the filing of this Petition. That State's Attorney, in his own behalf and *in his own name,* began this suit in July, 1933, to have your petitioner's employment with the County declared void and of no avail and to restrain and prevent any payments whatever being made to petitioner for legal services theretofore completed under that employment.

All services by petitioner were performed and completed before this suit was filed (Tr. 26).

During said domination by the new State's Attorney the delinquencies have grown and now "there are hundreds of millions of dollars of delinquent taxes against property in Cook County." *People* v. *Courtney,* 380 Ill. 171 at 180.

Your petitioner urges that the Supreme Court of Illinois has denied to your petitioner his constitutional rights, as stated elsewhere in this petition. And your petitioner contends that the Supreme Court of Illinois has decided this case adversely and contrary to numerous and all prior and settled decisions of that court itself upon which earlier decisions your petitioner properly relied and the County Board properly relied, in entering into employment; and that thereby your petitioner became vested with certain property and avails. And your petitioner therefore says

that the Supreme Court of Illinois has illegally and arbitrarily changed its own well-settled construction of the Constitution of Illinois, and of applicable Statutes of Illinois in the premises; and that the said Court has arbitrarily applied its new ruling in an *ex post facto* fashion in an attempt by the Court to destroy the vested rights of your petitioner.

Property rights vested in petitioner under important Illinois Cases which had established settled law before 1932.

These are cases upon which petitioner and Cook County relied in making employment. They had established a settled rule of property rights in Illinois for 60 years before the employment in suit was made.

Ottawa Gas Light & Coke Co. v. *People,* 138 Ill. 336 (1891).

This was a tax suit against the Gas Company by the County of La Salle to collect delinquent personal property taxes. The declaration was signed "M. T. Maloney, County Attorney." A motion was interposed in the trial—

> "To dismiss the suit because it had started without authority of law and by an attorney not authorized by law to bring or prosecute the same."

The motion was supported by two affidavits; the first, by one of defendant's counsel, setting out that Maloney was not the State's Attorney of the County and that the records of the court failed to disclose "any appointment of Maloney to prosecute the case." There was also the supporting affidavit of the State's Attorney of the County, setting up that

> "He (the State's Attorney) had neither been requested to prosecute the suit nor had he been sick, absent, or unable to attend the same, nor was he interested in the subject matter of the suit; that the suit was for re-

covery of a debt due the State of Illinois and La Salle County; but the State's Attorney (in the absence of the disabilities referred to) was alone authorized to prosecute; and that Maloney had no legal authority to institute or prosecute the suit."

There was a counter-affidavit by Maloney, setting up

"That he had been, by resolution of the Board of Supervisors of the County, authorized and directed to begin and prosecute the suit."

The trial court denied the motion to dismiss. A general demurrer was then interposed by the County to the declaration and the demurrer was overruled. Trial was had and judgment entered against the County for $2,597.00 and costs. On appeal the judgment was reversed by the Supreme Court on the ground of improper admission of evidence; but the Supreme Court specifically held that Maloney could act as counsel for the County in the further prosecution of the case. In so holding, the Supreme Court said:

"It was not error to overrule the motion to dismiss the suit. The attorney who instituted the suit, it was shown, was in that regard acting by the direction and under the authority of the County Board; and the authority of the County Board to institute and prosecute suits for delinquent taxes, whether due upon delinquent lands or personal property, is amply given in Section 230 of the Revenue Law.

"It is contended, however, that while the authority of the County Board to cause the institution of suits for unpaid taxes is ample, it is not at liberty to select counsel but must act by and through the State's Attorney of the county.' [Citing Chap. 14, Sects. 5 and 6 concerning the powers of the State's Attorney, and discussing them the Court continues:] "It would be perfectly competent for the County Board to direct the State's Attorney to recover delinquent and unpaid taxes and to prosecute the same and in such case it would be his manifest duty to act. * * * We are not

disposed, however, to hold that the County Board is, by the statute defining the duties of the State's Attorney, denied the power and authority to select and empower any *competent attorney* to represent the People in beginning and prosecuting suits to recover delinquent taxes."

Here we have a specific ruling by the Supreme Court in strong language, refusing the major contention of opposing counsel. The Supreme Court, in conclusion, on this point says:

"We have no doubt that under the general power of the County Board as the fiscal agent of the County it has the inherent right to direct the course of the proceedings [in suits to collect taxes] and to select the persons and agencies through which it will act."

Another important case which is squarely in point is *County of Franklin* v. *Layman,* 145 Illinois, 138 (1893) Affirming 43 Ill. App. 163; also 34 Ill. App. 606).

This case likewise is so important that it deserves a full analysis. The case was twice before the Appellate Court and was twice tried by the trial court before a jury. The suit was brought by certain attorneys against the county to recover for legal services furnished the county under a special contract. At the end of the first trial a verdict was returned for plaintiffs and judgment entered for $5367.76. This judgment was reversed in 34 Ill. App. 606, because of improper instructions given to the jury. On a second trial there was again a verdict for the plaintiffs for the same amount, upon which judgment was entered. The second judgment was affirmed in 43 Ill. App. 163. The Supreme Court, in the case here under discussion, affirmed the Appellate Court on the second appeal.

It appears that prior to 1880 Franklin County had issued $149,000 of its bonds in aid of a railroad company, $100,000

of its bonds being based on one Enabling Act of the Legislature, and $49,000 being based on a different Enabling Act. Some years later questions arose as to the validity of the bonds and the County determined to test their validity in the courts. In pursuance of that determination, the County Board made the special contract and employed the attorneys in the case. By the terms of the contract, the attorneys were

> "To commence proper suits and prosecute the same to final determination * * * for a retainer of $250 and the additional sum of $8,000 if and when the litigation was finally determined in favor of the County."

Thereupon there ensued several years of litigation as a result of which the County was successful, first, in defeating the $49,000 issue of bonds, and later in defeating the $100,000 issue. At the time of this trial the County had already paid the attorneys for their proportional amount of fees based on the $49,000 bond issue. After the $100,000 bond issue had likewise been held invalid the County refused to pay the balance of fees for that service and the suit was brought to recover that proportionate amount of fees. As already stated, the trial court, the Appellate Court, and the Supreme Court, all held that the attorneys were entitled to recover.

In its opinion the Supreme Court said, among other things:

> "It is next objected that the County could not lawfully enter into a contract to pay attorney's fees (under the facts of the case) * * * It is broadly conceded that the County had the right to test the validity of its doubtful obligations. But it is said that by the statute [Chap. 34, Sec. 33, concerning the duties of the County Board respecting suits, etc.] the power of the County Board is limited in its employment of counsel to prosecute suits in which the County is a party. We are not disposed to give this section the construction contended for it. * * *

"The County Board is authorized to carry into effect the powers of the County (Chap. 34, Sec. 33) among which is to make all contracts and to do all other acts in relation to the property and concerns of the County necessary in the exercise of its corporate powers. * * *

"We are of the opinion that such proceedings (as the litigation in the case) were within the spirit of the statute and that the *County Board had authority to enter into the said contract.*"

Here again we have a specific holding of the Supreme Court that the State's Attorney is not the exclusive attorney for a county board in civil procedings; but that where the county board determines it is necessary and desirable so to do, the county may employ outside counsel.

Another interesting case is

Wilson v. *County of Marshall,* 257 Ill. App. 220 (1930).

In that case the opinion holds that the County Board had power to make a special contract for outside attorneys, even though the State's Attorney had been available and had not been consulted. Justice Jones cites and relies on the case of *County of Franklin* v. *Layman* and *Ottawa Gaslight Company* v. *The People,* which we have discussed above in detail.

Another important case, which arose in Cook County, is

People v. *Straus,* 266 Ill. App. 95; 355 Ill. 640.

That was a tax foreclosure suit in the Superior Court where there had been an interlocutory order appointing a receiver of a large apartment hotel. The bill of complaint had been filed in the name of the People and was signed and sworn to by "Henry M. Ashton, their Attorney and Solicitor." Ashton had been appointed attorney for the County Board by a resolution of that Board. The

resolution is set out in the opinion. It refers to the non-payment of taxes in the county over a period of years, and the Court takes notice of the recital of the resolution that there had been a vast accumulation of unpaid taxes "thus creating an emergency situation with reference to the revenue."

It was contended by the defendant that

> "As Ashton was neither the State's Attorney nor the Attorney General * * * he had no right or authority to represent the People in the present suit and the resolution of the Board * * * employing him for the purpose therein stated was ultra vires *and void.*"

The opinion in the case is by Judge Gridley and is full and exhaustive. The opinion particularly refers to the case of *Abbott* v. *County of Adams,* 214 Ill. App. 201, cited and relied on by counsel for respondents in the case at Bar, and says that that opinion "has been overruled." Judge Gridley, in his opinion, refers to an opinion of the Attorney General (Attorney General's Opinion, 1928, page 240), holding that a County Board had legal authority to employ outside counsel in proceedings for the collection of delinquent taxes. The Attorney General's opinion is discussed at length thereafter. Judge Gridley's opinion concludes on this point:

> "In view of the statutes above quoted, the holding in the *Ottawa Gaslight* Case and the resolution of the Board of Commissioners of Cook County, we are of the opinion that the contention of appellants' counsel (that the State's Attorney was the sole lawful counsel of the Board in such matters) is without substantial merit."

The Appellate Court reversed the case, only on the ground that the appointment of a receiver to take charge of and manage the property during foreclosure of the tax lien was illegal.

The case went back for trial on the merits and a decree of foreclosure was entered. The plaintiff later went direct to the Supreme Court and that case is the one now to be discussed.

People v. *Straus,* 355 Ill. 640 (1934).

This was a writ of error from a decree of foreclosure of a tax lien in which there had been a decree for $165,683.99 of back taxes and a sale to the County. In the Supreme Court the County was represented by the State's Attorney, but another law firm had been substituted as associate counsel for the solicitor who had appeared for the County at the trial. In the Supreme Court the defendant again raised the objection that the trial in the County Court had been "improper" because the County had been represented by counsel other than the State's Attorney. The Supreme Court affirmed the decree below and denied the last mentioned contention, saying on this point:

> "Numerous cases are cited tending to show that it was the proper function of the State's Attorney to prosecute the case, and there is much argument for the purpose of showing that the contract between the County Commissioners and the solicitor who appeared for the People in the trial court was contrary to public policy and void. The particular case relied on in this connection is *Fergus* v. *Russell,* 270 Ill. 304. That case is not in point here because the employment was directly attacked there and not brought collaterally, as is attempted here. In *Mix* v. *People,* 116 Ill. 265, we used the following language:
>
> " 'The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor who brings it may not happen to be the State's Attorney or the Attorney General. • • • There is no statute requiring a bill of this kind to

be signed in the official character of either of those officers, as there is with reference to an indictment.'

"It sufficiently appears that the Board of Commissioners of Cook County authorized the commencement of this suit in the name of the People and that the People ratified the action through a purchase at the foreclosure sale. Having thus authorized, approved and ratified everything that was done, it makes no difference to plaintiff in error whether or not said solicitor was duly authorized to bring this suit."

Here again we have the Supreme Court making two significant and important distinctions with respect to the liability of the County in such cases as that now at Bar. In both cases the Supreme Court held that there was a difference between a direct attack on the right of the County Board to enter into employment of an attorney (and architect) and a case where a "collateral attack" was made after the employment had been effected and the work was done. In both cases the Supreme Court also held that where the party has accepted the benefit of the contract and the services rendered have been just and profitable to the County, it is then too late to raise even technical objections to the manner in which the contract for the employment has been made. This is an important point in the case at Bar, since it is admitted here that the employment in this case was very profitable to the County and the County was paying for the services only out of extra "penalties" which were collected as a result of the tax suits started by the plaintiff as the County attorney. The "penalties" were private property of the County of Cook, not distributable to other taxing orders.

In this *Straus* case the State's Attorney defended successfully the right of attorney employed to represent the County Board of Cook County 384 Ill. 287, 300.

In our comment about the *Straus* case in the Superior Court, we referred to the case of *Hall* v. *Cook County*.

Hall v. *Cook County*, 359 Ill. 528 (1935).

Both establish the rule of law that the County is in a weaker position in contending that employment of services of a professional character is invalid after the employment has been carried out and the County has received the benefit of it, than when a taxpayer's bill is filed to prevent the carrying out of the contract in advance of its execution. The late Mr. Erich Hall, who was County Architect, recovered *on appeal before the Supreme Court of Illinois* a judgment for $137,000 for architect's fees for services rendered in drawing plans for the defunct "Cook County Auditorium" which the County had planned to build and then abandoned. There, as here, the State's Attorney had objected to a recovery and contended that the County had no power to make the employment. In rejecting the County's contention on this point, the Supreme Court said in the *Hall* case:

> "The powers of the County are two-fold, viz.: its governmental powers and its business powers. Ordinarily, an estoppel or a waiver cannot be pleaded against a county for its failure to exercise its governmental powers, or the exercise of its governmental powers in an improper manner. This rule is not always true in the exercise of the municipality's business powers. In the cases cited by defendant * * * the assault was made by some taxpayer. * * * The same rule of strict construction should not be applied in behalf of a county where it attempts to take advantage of its own failure properly to exercise its business functions as is involved in behalf of the taxpayer who must pay the tax sought to be levied."

The earliest case which is concerned with the exact point raised by the motion to dismiss in this case seems to be

Mix v. *People*, 116 Ill. 265 (1886).

In that case the County of Kankakee filed a bill to foreclose a tax lien on some property in which Mix was interested. Foreclosure suit was begun by special counsel employed by the County and not by the State's Attorney. The defendant contended that the County had not authorized the suit and that the solicitor for the County had, therefore, been unauthorized and the suit was unjustified. In rejecting this point the Supreme Court said in *Mix* case:

> "Plaintiffs in error sought * * * to question the authority of complainant's counsel to bring this suit. * * * Counsel for defendant in error have presented no authorities on the subject or referred to any suit bearing upon it. We know, of none, except Chapter 14, Sections 5 and 6, concerning the duties of the State's Attorney to prosecute 'all actions and proceedings for the recovery of its revenues, moneys, fees, benefits and forefeitures accruing to the State or his County.' The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor may not happen to be the State's Attorney."
>
> *Dalby* v. *People*, 124 Ill. 66, 75.
>
> "As to the right of recovery for all the taxes, section 230 of the revenue law in its first clause provides that the *county board may institute suit* in an action of debt in the name of the people of the state of Illinois for the whole amount due on forfeited property; or any county, city, town, school-district, or other municipal corporation to which any such tax may be due, may institute suit in an action of debt in its own name for the amount of such tax due any such corporation on forfeited property. The second clause provides that the *county board may also institute suit* in action of debt in the name of the people of the state of Illinois against any person for the recovery of any personal property tax due from such person. Thus it appears that the first clause, with respect to

forfeited property, provides that the county board *may sue* for the whole amount of the taxes due on forfeited property, or only for the amount due the county; the suit in the former case to be brought by *the county board in the name of the people;* in the latter case, in the name of the county. The second clause respects personal property tax alone, and provides that the county board may also bring suit in the name of the people for the recovery of any personal property tax due from any person. Any personal property tax due from a person, embraced every personal property tax due from the person. Had the intention been to give to the county board the right of recovery only for the personal property tax due the county, we must think the limitation to the tax due the county would have been expressly named, and the right of action have been given in the name of the county, as was done in the first clause, in providing for recovery by a county of the amount of the tax due the county on forfeited property. We think, under the section last named, the right of recovery here is for all these personal property taxes due from the defendant; and, when recovered, it will be the duty of the county board to distribute them to the several municipal corporations to which they belong, as would have to be done in the case of a recovery by the county board under the first clause of the section of the whole amount of taxes due on forfeited property.

"The judgment will be affirmed."

Attorney General's Opinion.

We have referred to an opinion of the Attorney General of the State on the question here under consideration. In Attorney General's Opinions for year 1928, page 239, the State's Attorney of Alexander County addressed an inquiry to the Attorney General, asking the question—

> "The County Board of Commissioners would like to know if they have any authority to employ outside assistance in collecting delinquent taxes."

In answering this question in the affirmative, the Attorney General wrote:

> "In answer to your question, allow me to draw your attention to the following cases (citing *Ottawa Gaslight & Coke Company* v. *People*, 138 Ill. 336; *Abbott* v. *County of Adams*, 214 Ill. App. 201; *Stevens* v. *Henry County*, 218 Ill. 468; *Fergus* v. *Russel*, 270 Ill. 304; and continuing): An examination of the cases of *Abbott* v. *County of Adams* (*supra*) and *Stevens* v. *Henry County* (*supra*) and *Fergus* v. *Russel* (*supra*) shows that neither of these cases is the same as *Ottawa Gaslight & Coke Company* v. *People* (*supra*). Inasmuch as the Supreme Court has not reversed the rule stated in the case of *Ottawa Gaslight Company* (*supra*) it is my opinion that the County Board may employ a competent attorney other than the State's Attorney to represent the People in beginning and prosecuting suits to recover delinquent taxes."

Arbitrary Action Ex Post Facto by the Supreme Court of Illinois.

The Court may observe that the authorities cited in the foregoing opinion of the Attorney General refer to the powers of County Boards generally as provided by the Statutes of Illinois. The County Board of Cook County have, not only these general powers, but also special powers given to it by Article 10, Sections 7 and 10 of the Constitution of Illinois.

The opinion by the Supreme Court of Illinois expressly admits (384 Ill. at page 300) that said first order against your petitioner is an arbitrary departure from the established and prior law of the State of Illinois, as announced by the Supreme Court of Illinois. That is an admission that the rulings in this case are *ex post facto* as to the vested property rights of your petitioner, and that the judgment now under review is a denial of his constitutional rights

stated elsewhere in this petition. That Court said at page 300:

> "The statements in those cases which are contrary to the conclusions reached are not adhered to."

Repeated Action By State's Attorney.

Every county budget approved by Respondent State's Attorneys in office from the year 1933 to the year 1948 inclusive, has provided for the employment of Special Attorneys for the County Board and for various County Officers. This action so approved by State's Attorney of Cook County, is illustrated by the items from the County Budget of Cook County for the year 1948 which are reproduced before at page 3. It is unconscionable for State's Attorney to contend as he has in this lawsuit, that the County Board has no power to employ Winston, when during the same period and under the same Constitution and Statutes, said State's Attorney has expressly approved such County Budgets. Furthermore, he has expressly approved such County Budgets and defended this same employment in *Straus* v. *People* as stated above. Furthermore, it is unconscionable and a wilful attempt to destroy the property rights of Winston without any process of law, when the conclusion of this lawsuit was delayed after 1934 when the first ruling was made by the Supreme Court of Illinois adverse to Winston, after Respondent State's Attorney joined in the contention made in the case of *People* v. *Straus*, 266 Ill. App. 95, and 355 Ill. 640, which were sustained to the effect that no parties on that record could object to the validity of the employment of Winston as counsel and attorney for Cook County, with reference to delinquent tax proceedings.

During the seven years from October 1935 when the first mandate of the Supreme Court was filed, until October

1942, when proceedings were pressed by defendant Winston that led to the second appeal, no action was taken by the State's Attorney nor the County of Cook.

From November 1943 when the second mandate was filed in the Circuit Court, until April 1947 when Winston filed his Amended Answer and Counterclaim, another period of 42 months elapsed without any action in the case by the State's Attorney nor the County of Cook.

Thereby it is shown that during 11 of the 14 years this suit has been pending, no action was taken whatever by the State's Attorney nor the County of Cook to bring the case to any conclusion.

Such a record establishes the arbitrary attempt by the State's Attorney and the County of Cook to deny to Edward M. Winston his primary rights under the Constitution of Illinois and the Constitution of the United States. The denial of relief to Winston on the present record is *ex post facto*, retroactive, an unequal administration of law and contrary to due process of law.

Amendment 14, Section 1, of Constitution of United States:

Sections 11 and 19 of Article 2 of Constitution of Illinois:

Daly v. *City of Chicago*, 295 Ill. 276, 129 N. E. 139.

This shows a deliberate intention by the State's Attorney, to reap for the County the full advantage and effect of the legal services rendered by Winston for the County, before the State's Attorney will or would bring forward for decision and conclusion the question as to payment of Winston for legal services to Cook County. We submit that is not only unconstitutional and illegal, but it is plainly immoral. That is so stated and established by many decisions of this Court.

Public importance of this case.

This is not a political case. We present for review a breach of basic civil rights fully as much as the recent County Board continuously and currently ever since the Year 1870 when the Constitution was adopted, has employed and has paid many attorneys for many sorts of legal services entirely outside of the Staff who are permanently employed as full time Assistant State's Attorneys, by the State's Attorney of Cook County.

Petitioner Winston seeks to recover for private damage caused by infringement upon his franchise to practice law, fully established by the Constitution and by decisions since the year 1870. He urges that the adverse rulings below by the Supreme Court of Illinois, are arbitrary departures from the meaning and effect of the Statute (Section 13 of Chapter 1 of Ill. Rev. Statutes) and his license and franchise at law, which he has exercised for more than fifty years. And thereby his vested rights under the Constitution, are taken away by arbitrary action by Illinois courts.

Lasdon v. *Hallihan*, 377 Ill. 187 at 195.

Not only all Members of the County Board for more than seventy years, but also all such employees for that period, are placed under the cloud of these opinions brought here for review.

The delinquent tax emergency of the 1930's may accur again. If the ruling made by the Illinois courts in this suit is not reversed, the people of Illinois and of Cook County will be unable again to employ private attorneys upon contingent fees when the treasury is empty, and public financing is not a possibility.

Furthermore the provisions of Article X, of the State

Constitution are erased altogether, and the future conduct of the County business for more than four million people is directly involved.

In *Republic Natural Gas Co.* v. *State of Oklahoma*, 68 S. Ct. 972 at 976 your Honors rule:

> "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailable." Citing cases.

Conclusion for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays for the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

OPINION BY THE ILLINOIS SUPREME COURT.

Docket Nos. 27163 and 27169, 384 Ill. 283.

Mr. Justice Murphy delivered the opinion of the court:

Pursuant to an order entered in vacation, causes No. 27163 and No. 27169 were *consolidated for oral argument and opinion.* The primary question in each case is as to the liability of the county of Cook to pay appellants Henry M. Ashton, Edward M. Winston and Ralph O. Butz, all of whom are lawyers, for legal services performed by them for the county pursuant to the terms of *contracts* of employment. The *contracts* provided that appellants were to institute legal proceedings and take such steps as were necessary to collect forfeited real estate taxes and penalties. On behalf of the People, represented by the State's Attorney of Cook County, it was contended that the board of commissioners of the county acted without authority of law, that their acts were *ultra vires* and the *contracts* void. It is claimed that the action of the board in employing private attorneys to perform such services was in effect taking a power and duty given by the constitution and statute to the State's Attorney and conferring it on another. These contentions involve interpretation of certain provisions of our State constitution and this gives the court jurisdiction to review the cases on direct appeal.

On May 22, 1931, the board of commissioners of Cook

county adopted a resolution purporting to employ Henry M. Ashton as an attorney, which resolution, with appellants' written acceptances and certain supplementary resolutions, constitutes *the contracts* involved in these cases. In the preamble to the resolution it was recited that there was more than $16,500,000 due in taxes on real estate in Cook County that had been forfeited to the State for nonpayment; that by statute it was the nominal duty of the State's Attorney of the county to prosecute actions for the collection of delinquent taxes, if and when the county board provided by budget for the same, but that in recent months the number of forfeitures had increased to such an extent that the appropriation for the current year to the State's Attorney was inadequate to enable him to perform the work involved in bringing such a large number of cases. It was stated that a large number of persons who had permitted their real estate to be forfeited for nonpayment of taxes were financially responsible; that a large amount was due as penalties, that in some instances the accumulated penalties exceeded the amount of taxes due, and that all penalties when collected were the property of the county. It was stated that the regular duties of the legal adviser of the county board were such that he did not have time to enforce the collection of forfeited real estate taxes, that during the last five years the State's Attorney had collected in forfeited taxes and penalties about $200,000 per year. In consideration of such premises, it was resolved: "That Henry M. Ashton, attorney at law be and he is hereby retained and employed to begin and prosecute foreclosure suits and such other suits or proceedings as may be deemed desirable in order to collect the revenue now due to the State of Illinois and other taxing bodies from real estate in Cook county that is now forfeited to the state:

"That said Henry M. Ashton is hereby authorized and empowered to appear for and in behalf of and to represent the People of the State of Illinois and the County of Cook in all such suits as their attorney and solicitor; • • •

"As the amount provided for in the 1931 budget to take care of this work of securing additional revenue from forfeited property in Cook county is not sufficient to insure a continuation of said work, the contract between this Board and the said attorneys shall be considered a contingent one from the beginning of said attorney's employment. The sums to be paid by Cook county, as above set forth and as appropriated, shall be considered as an advance to said attorney for fees and expenses in order that said work may be properly started;

"However, all sums paid to said attorney, as well as all sums paid to his assistant, for clerk hire, stenographic, and other expenses, shall be first deducted before any further money shall be paid to said attorney; • • •."

Provision was made in *the contract* to pay Ashton $600 per month and an additional amount of $700 per month budgeted as follows: an assistant not to exceed $300, a clerk $250 and a stenographer $150. It also provided that Ashton should be paid a contingent fee, the same to be computed upon the taxes and penalties collected, but that such fee should not be paid except from the penalties so collected. Various contingencies were set forth upon which the contingent fee was payable, the lowest percentage being fifteen percent (15%) of the tax and penalty where there was one penalty, and scaling upwards of twenty percent (20%) where there were two penalties, and twenty-five percent (25%) where there were more than two, with the further provision that if in any six months' period voluntary settlement was made with

the county treasurer through the State's Attorney's office, where the sum received exceeded $150,000, then Ashton was to receive as further fee a sum equal to five percent (5%) of such excess, with the provision that in computing the amount due under the five percent (5%) clause the sums collected either by the State's Attorney or Ashton by suit or foreclosure should not be included. Claims for the regular monthly charges were to be paid on Ashton's verified statement and settlements were to be made as specified. It provided that the board of commissioners reserved the right to determine the basis of settlement with the property owner and the amount of penalty to be paid in cases where there was an adjustment for less than the total allowed by statute. It was stated that *the contract* should be effective as of May 15, 1931, and should terminate on November 30, 1932, unless renewed by the county board and said attorneys.

On May 25, 1931, Henry M. Ashton addressed a communication to the board, which referred to the resolution of May 22 and stated, that he accepted the employment on the terms outlined and would proceed with the work at once. The then State's Attorney approved the resolution as to form.

On April 16, 1932, Ashton addressed another communication to the board suggesting that Edward M. Winston, who is one of the appellants herein, be authorized to carry out Ashton's contract from that date until December 1, 1932. The request was approved April 27, 1932, and Edward M. Winston was given full power and authority to represent the board "in all suits heretofore brought under said contract and to carry such suits to completion; and authority is also given hereby to the said Edward M. Winston to begin and prosecute with full power as attorney for this Board all other suits and proceedings which

he may deem necessary and desirable to collect delinquent taxes due and unpaid on real estate in Cook county under the terms and conditions as to compensation which were provided in *the contract* with Henry M. Ashton."

On November 22, 1932, the board adopted a further resolution which recited "That the authority heretofore granted by resolution of this Board to Edward M. Winston to represent said Board is hereby extended to March 15th, 1933, with full power to begin any suits for collecting of delinquent taxes which he may deem desirable during the said period and to prosecute them to completion, and that the terms and conditions set forth in the *original contract* with Henry M. Ashton, dated May 15, 1931, and the resolution of authority to Edward M. Winston, dated April 27, 1932, shall be in force except as herein modified."

At the November election, 1932, another was elected to succeed the former State's Attorney and on July 22, 1933, he filed an information in equity in the circuit court of said county in which he made Ashton, Winston and the several members of the board of commissioners parties defendant. It was alleged that Ashton and Winston had received $20,000 pursuant to said contract, that another item of $7263.92 had been audited, county warrants issued and would be delivered unless enjoined by decree of court. It was charged that the several resolutions adopted by the board were *ultra vires,* that *the contract* was illegal and void. The prayer was that Ashton and Winston be required to account for the $20,000 previously received, that payment of the $7263.92 be enjoined and that plaintiffs be granted relief.

The county commissioners, Ashton and Winston filed separate pleadings. An issue was raised on a motion to dismiss as to whether it was within the powers and duties

of the State's Attorney to bring an action on behalf of the People against the county commissioners of the county while he was the legal adviser of such board. The motion was sustained and the cause dismissed. On direct appeal (*People* v. *Ashton,* 358 Ill. 146) the decree was reversed and the cause remanded with directions.

After the cause was redocketed and the mandate filed, Ashton and Winston each filed an answer. Winston also filed a counterclaim to recover the fees due on the contract. He claimed the amount due was in excess of one and one-half million dolars. The State's Atorney's motion to strike Winston's answer and counterclaim was sustained and Winston elected to stand by his pleading whereupon a final judgment was entered against him. He brings the cause here for review.

Cause No. 27163 is an action at law instituted by Ashton and joined in by Butz against the county of Cook to recover the fees alleged to be due on the same resolutions and acceptances set forth in No. 27169. Winston was made a defendant. This suit was filed June 26, 1939. Butz filed a separate complaint i n which it was alleged that during the regime of both Ashton and Winston he carried the burden of drawing the pleadings in all cases filed to enforce the collection of delinquent taxes; that he filed petitions to intervene in certain cases pending in the Federad courts and prosecuted claims in probate court against estates of deceased persons, and that Ashton, Winston, the county of Cook and the then State's Attorney had knowledge that he was performing such services. He claimed that $1,714,682.92 was due him for fees. A second count was on *Quantum meruit.* Winston filed an answer and counterclaim adopting Ashton's and Butz's pleadings.

The State's Attorney's motion to strike Ashton's and Butz's complaint and Winston's answer and counterclaim was sustained and a final judgment entered. Ashton and Butz perfected a joint appeal and Winston brings his cause here by a separate appeal. They will be referred to as appellants, and the People as represented by the State's Attorney as appellee.

Appellee's motion to dismiss contained nine assignments but the ones urged here as grounds for reversal pertain solely to the power of the board of commissioners *to make the contracts in question.* Appellants have also pleaded estoppel against the county. It is not claimed that appellants were employed to render service in actions then pending, therefore, the provisions of section 6 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 6) have no application.

The law authorizes court action to enforce the collection of delinquent real estate taxes. That appellants filed such suits in the name of the People and as a result of their efforts there was collected and paid into the county treasury more than $16,000,000 is admitted by the motions to strike. The principal question is as to the power of the board to employ private counsel to conduct such litigation, but appellee's contention that the board was without such power, and that the law confers such power on and makes it the duty of the State's Attorney to render such legal service, necessitates an examination of the law as to the powers of the board and the State's Attorney in such matters.

Section 7 of article X of the constitution provides that the "county affairs of Cook county shall be managed by a board of commissioners of fifteen persons * * * in such manner as may be provided by law." The fullest meaning that can be given to such language is that it cre-

ates the board of commissioners and vests in it the power to manage the county affairs. The scope and breadth of the phrase "county affairs" is not defined, nor is there amplification as to what authority the board may exercise and be within the scope and meaning of the word "manage." It is therefore necessary to look to the legislative enactments for the power that has been delegated to the board in the management of county affairs and determine whether the power here exercised was conferred by statute. *Dahnke* v. *People*, 168 Ill. 102.

By section 22 of the Counties Act (Ill. Rev. Stat. 1941, chap. 34, par. 22,) a county may sue or be sued, and by section 23 it is directed that "the powers of the county as a body corporate or politic, shall be exercised by a county board, to-wit: * * * in the County of Cook by a board of county commissioners, pursuant to section 7 of article X of the constitution." Other provisions pertaining to the powers of the board are found in subparagraph 3 of section 24, which directs that the board has power "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exerise of its corporate powers." Subparagraph 2, section 25, gives the board authority to manage the county funds and county business, and by subparagraph 5 of the same section it is given authority to levy and collect taxes for county purposes. By section 33 of the Counties Act it is made the duty of county boards "to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessments.

Section 22 of artcle VI of the constitution creates the office of State's Attorney and provides for his election.

Section 32 of the same article refers to the residence, the performance of the duties of the State's Attorney and other officers and the manner in which vacancies in any of such offices may be filled. It is provided that "all officers, [which includes State's Attorneys] where not otherwise provided for in this article, shall perform such duties and receive such compensation as is or may be provided by law." It will be observed that these constitutional provisions do not prescribe the specific duties of the State's Attorney. It has been held that the State's Attorney is an officer provided for by the constitution and that he is a county officer. (*Cook County* v. *Healy*, 222 Ill. 310.) Section 5 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap, 14, par. 5) directs it shall be the duty of the State's Attorney "to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his ouenty, in which the people of the state or county may be concerned," and second, "to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the state or his county, or to any school district or road district in his county, * * * which may be prosecuted in the name of the People of the State of Illinois."

By the latter provision the duty to prosecute all actions and proceedings for the recovery of revenues and penalties is expressly imposed on the State's Attorney of the county where the default occurred. By section 33 of the Counties Act, the duty is imposed upon the county board to take and order suitable and proper measures for the prosecution of all suits which it may be necessary to start to enforce the collection of taxes charged on the State assessment. The general subject matter of these two statutes, so far as pertinent here, is the collection of delinquent taxes. The former contains the express direc-

tion imposing the duty upon the State's Attorney to prosecute such actions. This is in keeping with the purpose for which the office of State's Attorney was created. He is the attorney and legal adviser of the county officials in all matters pertaining to the official business of the county, but his powers and duty pertain solely to those matters in which a knowledge of the law is required. Section 33 of the Counties Act contains no express authorization empowering it to employ private attorneys to institute such proceedings. If any such power is conferred it could arise only by implication.

The rule is that where there is to be found in a statute a particular enactment, it is to be held operative as against the provisions on the subject either in the same act or in the general laws relating thereto. *Robbins* v. *Lincoln Park Commissioners,* 332 Ill. 571; Handtoffski 1. Chicago Consolidated *Traction Co.,* 274 Ill. 282; *City of Chicago* v. *M. & M. Hotel Co.,* 248 Ill. 264.

But we do not regard these statutes as being in such conflict that a rule of construction must be adopted which accepts one and rejects the other. All statutes relating to the same subject must be compared and so construed with reference to each other that effect may be given to all the provisions of each, if it can be done by any fair and reasonable construction. It is presumed that the several statutes relating to one subject are governed by one spirit and policy and that the legislature intended the several statutes to be operative and harmonious. (*Ketcham* v. *Board of Education,* 324 Ill. 314.) The direction in section 33, that the county board shall take and order suitable and proper means for the prosecution of suits brought to enforce the collection of taxes, evidently means that the board, as the governing agency of the county in charge of expending the county's funds, has the duty of

meeting the expenses necessarily incurred in such litigation. Such duty is similar to the general duties of the board and the purposes for which the board was created by the constitution. It is in accord with its functions generally as outlined by statute. The performance of such a duty is in a field foreign to the field in which the State's Attorney performs his duty. The duty resting upon the State's Attorney to prosecute suits for the collection of delinquent taxes requires performance in a field outside the scope of the duties of a county board. It seems that the legislature intended to preserve a relationship between the duties of the board and those of the State's Attorney which is not dissimilar from that of attorney and client.

It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (*Marsh* v. *People*, 226 Ill. 464; *County of Cook* v. *Gilbert*, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiesence to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.

Appellants rely upon cases such as *Mix* v. *People*, 116 Ill. 265, and *Ottawa Gas Light and Coke Co.* v. *People*, 138 Ill. 336, as holding that a county board has authority

to employ private counsel to enforce the collection of delinquent taxes. There are statements in the opinions in those cases which appear to support appellants' contentions, but the ruling in such cases must be considered in the light of the facts. In each of them the authority of private counsel to represent the plaintiffs was questioned by a taxpayer against whom the suit to collect had been instituted, while in these cases it is a direct attack upon the power which the board undertook to exercise. This distinction was noted in *People* v. *Straus,* 355 Ill. 640. That was an action to foreclose a tax lien started by one of the appellants in these cases as attorney for the People serving under the contracts in question. His authority to appear in such capacity was questioned. In noting that it was a collateral attack on his authority raised by a taxpayer it was said: "Numerous cases are cited tending to show that it was the proper function of the State's Attorney to prosecute this case, and there is much argument for the purpose of showing that the contract between the county commissioners and the solicitor who appeared for the People in the trial court is unconscionable, contrary to public policy and void. The principal case relied on in this connection is *Fergus* v. *Russel,* 270 Ill. 304. That case is not in point on this inquiry, because the employment was there directly attacked and not brought collaterally in issue as is attempted here." The statements in those cases which are counter to the conclusions reached are not adhered to.

The law is well settled that when the constitution or the laws of the State create an office, prescribes the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which

were imposed upon such officer. (*Fergus* v. *Russel*, 270 Ill. 304; *Stevens* v. *Henry County*, 218 Ill. 468; *Hope* v. *City of Alton*, 214 Ill. 102.) The *contracts* of employment under which appellants claim were *ultra vires* and void.

Appellants contend, that even though *the contracts* are *ultra vires* and void, the county having received the benefits of their services by the collection of more than $16,000,000 of delinquent taxes, it is now estopped to deny its liability to pay for such services. They cite and rely upon cases such as *Hall* v. *County of Cook*, 359 Ill. 528. Such contention ignores the distinction made in many cases between *contracts* of a municipality which are *ultra vires* for want of power to make and which are wholly void, and those cases where the municipality had the power to act but by reason of an improper exercise of the power the contract is void. The *Hall case* and other cases are of the latter class.

In *Hope* v. *City of Alton*, 214 Ill. 102, an ordinance of the city created a legal department and prescribed its duties. While such ordinance was in full force, the city council adopted a resolution employing a private attorney to appear in litigation in which the city was a party. In an action by such attorney to recover for compensation for such services, this court held that the act of employment was void and that the city was not estopped from defending on the grounds that it had no power to make the contract. This case is controlling here. The principle has been often stated as follows: Everyone is presumed to know the extent of a municipal corporation's control over its public funds and such corporation can not be estopped to aver its incapacity when an effort is made to enforce against it *a contract* which provides for

payment from such funds when it had no power to make such an agreement. *People* v. *Parker,* 231 Ill. 478; *May* v. *City of Chicago,* 222 Ill. 595; *City of Danville* v. *Danville Water Co.,* 178 Ill. 299.

Appellants also contend that they should be permitted to recover on a *quantum meruit.* Such a recovery is founded on the implied promise of the recipient of services or material to pay for something which he has received that is of value to him. Such principle can have no application in this case for the reason *that the contracts were wholly void and created no rights and imposed no obligations. They came within the principle of law that where the legislature* has withheld a power it is the same as though the exercise of the power was prohibited by law. (*Continental Ill. Nat. Bank and Trust Co.* v. *Peoples Trust and Saving Bank,* 366 Ill. 366.) To permit recovery of compensation in these cases on a *quantum meruit* would, in legal effect, give sanction to the giving of public funds to private use for the performance of duties which the law imposed upon the State's Attorney and for which he receives the salary fixed by law.

Appellee contends that there was no appropriate ordinance in existence when *the contract* was made covering the liability incurred and that, therefore, the *contract* was void. Appellants' pleadings contained allegations of facts relative to items of the appropriation ordinance for the year in which the *contract* was made, and it is argued that the motion to dismiss admitted these facts which it is claimed are sufficient to show the liability incurred was covered by proper appropriation. The *contracts* having been declared void under the views expressed, therefore it is not necessary to consider the question of the sufficiency of the facts pleaded to show a proper appropriation.

The decree in No. 27169 sustaining the motion to strike appellants' answer and counterclaim was correct and will be affirmed, but as the appellee asked for certain other relief against the defendants and for the purpose of preserving the rights and questions under that branch of the case, the cause is remanded to the circuit court with directions to proceed as to suh matters. The judgment sustaining appellee's motion to strike appellants' pleading in No. 27163 was correct and is affirmed.

No. 27163, *Judgment affirmed.*
No. 27169, *Decree affirmed, and cause remanded, with directions.*

Docket 30261, *People* v. *Winston,* 399 Ill. 311.
THOMPSON, Justice.

This is an appeal from an order of the circuit court of Cook County striking an amended answer and counterclaim filed by appellant, Edward M. Winston, to recover a reasonable compensation for legal services performed by him in the collection of forfeited real estate taxes, pursuant to his employment by the board of commissioners of Cook County. This cause is now before us for the third time. The decisions upon the two former occasions are reported in *People ex rel. Courtney* v. *Ashton,* 358 Ill. 146, 192 N. E. 820, and *Ashton* v. *County of Cook,* 384 Ill. 287, 51 N. E. 2d 161. A complete statement of the resolutions of the board and the facts concerning appellant's employment is contained in those opinions.

On July 22, 1933, the State's Attorney of Cook County instituted this suit, numbered B-272693, in the circuit court of that county by filing an information in equity against Winston and others, charging that the resolutions adopted by the board were *ultra vires* and void; and praying that Winston be required to account for money previously re-

ceived by him pursuant to his contract of employment and that the board of commissioners be enjoined from paying him the sum of $7263.92, which had been audited and allowed to him under his said contract of employment. A motion to dismiss was filed by the defendants. The circuit court sustained the motion and the cause was dismissed. A writ of error to review the order of dismissal was issued to the circuit court by this court, and this court, upon hearing, reversed the decree of the court below and remanded the cause to that court. *People ex rel. Courtney* v. *Ashton*, 358 Ill. 146, 192 N. E. 820.

After the case was remanded, Winston filed an answer and counterclaim in which he sought to recover the fees alleged to be due him under his contract of employment with the board of commissioners. A motion to strike the answer and counterclaim was sustained. Winston elected to stand by his pleading and thereupon final judgment was entered, dismissing the same for want of equity and directing that he take nothing by his counterclaim. The court, however, in the decree, reserved jurisdiction on the subjects of accounting and injunction as against Winston. An appeal was taken by Winston from that decree to this court. This appeal, No. 27169, was consolidated with another appeal of Winston's, then pending before us in cause No. 27163, the primary question in each being as to the liability of the county of Cook to pay for legal services performed pursuant to employment by the board of commissioners.

Cause No. 27163 was an appeal in an action at law, numbered 39C-6955, in the circuit court of Cook County, filed by Henry M. Ashton and Ralph O. Butz against the county of Cook to recover for legal services performed by them under similar employment by the board of commissioners. Winston, who was first made a defendant but upon his

petition was dismissed as defendant and joined as a plaintiff, filed an answer and counterclaim seeking recovery from the county for the same legal services performed by him as were involved in cause No. 27169 and are involved in the present appeal. Butz also filed a separate complaint, which contained a count on *quantum meruit*. The county moved to strike the complaints of Ashton and Butz and the answer and counterclaim of Winston. The court sustained the motion and entered an order striking said pleadings and dismissing the cause, after first reciting that in the opinion of the court it would be impossible for the plaintiffs, Henry M. Ashton, Ralph O. Butz and Edward M. Winston, to state a good cause of action predicated on the legal services alleged to have been performed or on the subject matter in the contracts here involved or on said contracts, and that it would be futile to grant leave to the said plaintiffs to amend. It was from this order that Winston, as well as Ashton and Butz, perfected appeals to this court in cause No. 27163, which were consolidated with the appeal of Winston in cause No. 27169; and this court, on hearing the consolidated appeals, affirmed both the decree and the judgment from which said appeals were taken. *Ashton* v. *County of Cook,* 384 Ill. 287, 51 N. E. 2d 161, 168. The judgment in cause No. 27163 was affirmed without remanding the cause. The decree in cause No. 27169 was affirmed and the cause remanded with directions, both the opinion and the mandate of this court reciting that "as the appellee asked for certain other relief against the defendants and for the purpose of preserving the rights and questions under that branch of the case, the cause is remanded to the circuit court with directions to proceed as to such matters."

In the opinion then filed (*Ashton* v. *County of Cook,* 384 Ill. 287, 51 N. E. 2d 161, 167), it was held that it is the

duty of the State's Attorney to prosecute suits to enforce the collection of delinquent taxes and the county board has no authority to employ private counsel in the collection of such taxes, that therefore the contracts of employment under which Winston and the other appellants claimed were *ultra vires* and void, the county was not estopped to deny its liability to pay for their services, and appellants could not recover either upon said contracts of employment or on a *quantum meruit*. With respect to the question of estoppel, it was said: "Everyone is presumed to know the extent of a municipal corporation's control over its public funds and such corporation cannot be estopped to aver its incapacity when an effort is made to enforce against it a contract which provides for payment from such funds when it had no power to make such an agreement." And in discussing the contention that recovery should be permitted on a *quantum meruit*, it was said: "Such a recovery is founded on the implied promise of the recipient of services or material to pay for something which he has received that is of value to him. Such principle can have no application in this case for the reason that the contracts were wholly void and created no rights and imposed no obligations. *They come within the principle of law that where the legislature has withheld a power it is the same as though the exercise of the power was prohibited by law. Continental Illinois Nat. Bank & Trust Co.* v. *Peoples Trust & Savings Bank*, 366 Ill. 366, 9 N. E. 2d 53. To permit recovery of compensation in these cases on a *quantum meruit* would, in legal effect, give sanction to the giving of public funds to private use for the performance of duties which the law imposed upon the State's Attorney and for which he receives the salary fixed by law."

After the cause was remanded, Winston filed an amended answer and counterclaim for an accounting in equity and

compensation for his said legal services and reimbursement for expenses. *This amended pleading avers that the written resolution of the board of commissioners, in accordance with the mandate of this court, is not a contract, but alleges that such resolution, adopted by the board with the written consent thereto of the State's Attorney, was governmental action, sanctioned by section* 10 *of article X of the constitution,* Smith-Hurd Stats., appointing and directing appellant as special attorney to carry out the instructions given to him in such resolution until such time as the State's Attorney or the county board might recall their joint approval and consent for appellant to conduct litigation referred to him by the county board, with the consent of the State's Attorney; that by filing the present suit on July 22, 1933, the State's Attorney withdrew approval and consent to further continuance of action under such resolution; that before such rescission, appellant had performed substantial legal services and had incurred and paid various expenses as directed to do by said county officials, and there had been audited and allowed by the county, through its regular administrative channels, as an account stated to December 31, 1932, for such expenses, the sum of $7263.92, no part of which had been paid to appellant; *that by reason of the legal services of appellant prior to the filing of the present suit, there was collected and paid into the county treasury of Cook County upwards of* $16,500,000; *and that under section* 10 *of article X of the constitution and as a matter of law and equity and good conscience, it is the duty of the county to reimburse appellant for his expenses incurred, and that, likewise, there is also due to appellant a reasonable compensation for his said legal services to be measured by the benefits conferred and the unjust enrichment achieved and obtained by the county by reason of such services.*

The county filed a motion to strike this amended answer and counterclaim upon the grounds (1) that the subject matter thereof had been fully adjudicated against appellant by the final orders of the circuit court entered in this cause and in case No. 39C-6955 in said circuit court, and by the judgment of this court in *Ashton* v. *County of Cook,* 384 Ill. 287, 51 N. E. 2d 161, affirming said final judgment and said final decree of the circuit court; (2) that the filing of said amended answer and counterclaim is contrary to the mandate of this court in *Ashton* v. *County of Cook,* 384 Ill. 287, 51 N. E. 2d 161; and (3) that the subject matter of said amended answer and counterclaim does not afford a basis in law or chancery for recovery.

The court sustained the motion and entered an order dismissing the amended answer and counterclaim, for the reason that the subject matter thereof had been fully adjudicated by the said court and affirmed by this court and for the reason that the said amended answer and counterclaim is contrary to the mandate of this court previously filed in this cause. From this order Winston has perfected an appeal and again brought the record before us for review.

(1) It is well settled, as appellant concedes, that when a cause has been once determined by a court of last resort, in a decision covering the merits of the case, the unsuccessful party cannot have another hearing on a second appeal as to the same matters or cause of action. Appellant contends, however, that his amended answer and counterclaim sets up a new cause of action, based upon a new theory and raising new issues and new constitutional questions which were not involved in the other appeal. He claims the only question determined by the appeal in *Ashton* v. *County of Cook,* 384 Ill. 287, 51 N. E. 2d 161, was that the resolution of the board of commissioners in relation to appellant was

not a contract and that therefore his answer and counterclaim asserting it was a valid contract should be stricken; that his amended answer and counterclaim does not rely upon any theory of contract, express or implied, but by its language expressly excludes all theory of contract; that the new pleading does not claim that the resolution was a contract or that it created a contractual relationship with appellant, but that it claims and shows that the resolution was an act of legislation, enacted by the board of commissioners under the authority of section 10 of article X of the constitution and that appellant had an employment and status as special attorney, created by said resolution of the board, authorizing and directing the services rendered for which the counterclaim is brought.

(2, 3) It is apparent upon the face of the amended counterclaim and from the contentions urged in support thereof, that appellant seeks a reversal of the former holding, declaring the resolution in question utterly void for want of power in the board of commissioners to employ private attorneys to collect delinquent taxes. The argument of appellant, although purporting to be in support of a new theory and a new cause of action is apparently directed against our former opinion. We held there the board of commissioners was prohibited by law from employing private attorneys to collect delinquent taxes and that the resolution of the board authorizing and directing appellant to perform such services was wholly void and imposed no obligation upon the county. Our decision in the Ashton case leaves no doubt on this point, and, under our reasoning as presented there, no difference appears whether the resolution be called a contract or an act of legislation, or whether appellant claimed such resolution gave him a contract of employment, or whether it created a status of

employment. In either case, and regardless of the designation by which the resolution be referred to, or of the nature of the claim based thereon for services rendered thereunder, the fact remains that such resolution is an attempt by the board to exercise a power prohibited by law and is therefore necessarily ultra vires and void. That question was settled upon the former appeal, and we are not at liberty upon this appeal in the same case to re-examine and determine the same. The decision in the first appeal has become the settled law of the case (*People ex rel. Leighty* v. *Young*, 309 Ill. 27, 139 N. E. 894; *People* v. *Union Trust Co.*, 280 Ill. 170, 117 N. E. 385): and we will take judicial notice upon this appeal of the record reviewed and the questions decided upon the former appeal of the case. *Newberry* v. *Blatchford*, 106 Ill. 584.

Appellant's position in his counterclaim contending he is entitled to compensation because of the benefits conferred upon the county and the unjust enrichment obtained by the county by reason of such services is not tenable. His claim for compensation and his rights to recover for services performed in pursuance of the invalid resolutions of the county board were fully adjudicated and all matters pertaining thereto were determined and fully disposed of.

The decree of the circuit court striking appellant's original answer and counterclaim was affirmed and the cause remanded to the trial court, not for further proceedings in regard to appellant's claim against the county or for the purpose of relitigating in any manner the question of the county's liability to appellant, but for the purpose of proceeding on the subjects of accounting and injunction as against appellant, concerning which subjects the circuit court in the decree appealed from had retained jurisdiction. In obedience to the mandate, it would seem to have been the duty of the circuit court to have refused leave to file

the amended answer and counterclaim. However, the court, on motion, struck the amended pleading which was filed and this accomplished the same result. There was no error in this, and the decree striking appellant's amended answer and counterclaim must be, and the same is, hereby affirmed.

Decree affirmed.

IN THE

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vs.

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Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

There heard on appeal from the Circuit Court of Cook County.

REPLY BY PETITIONER WINSTON TO ANSWER BY STATE'S ATTORNEY TO PETITION FOR WRIT OF CERTIORARI.

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REPLY BY PETITIONER WINSTON

Respondents Principal Citation Sustains Petition by Winston

Respondent State's Attorney at page 9 of answer, quotes from the case of *Brinkerhoff-Faris Trust and Savings Company* v. *Hill, the County Treasurer,* 281 U. S. 673. But the actual decision in that case, reversed the ruling by the

Supreme Court of Missouri, for the reason that the procedures there demanded by the state courts, had denied to that petitioner, due process of law under the fourteenth amendment. Compare that case with our record (tr. 35-48).

The denial of hearing in this case to Winston as shown by his Petition to this court, is equivalent to the denial of hearing in that Brinkerhoff-Faris case. The effective denial in each case, was accomplished by sham procedure and a fog of protestation. The fact is that in each case the state courts applied the ancient shell game procedure. The litigant must guess under which of three or several shells the successful procedure is to be found, and it is not under any of them no matter what selection is made by the litigant. Your honors have said so in the Marino and other criminal cases (332 U. S. 561). You have reversed because confusion of procedure was used by the state courts to mystify and defeat the litigant by manipulation.

That Brinkerhoff-Faris case is good precedent and clear reason for this court to grant the Writ of Certiorari to Winston, and to reverse the action by the Illinois courts in this record. That decision is in line with the citations made at pages 6 and 7 and 51 of our Petition.

What The Answer Says

The Answer says that an act of *Legislation* ex post facto by a state, is reviewable by this court; but the State's Attorney insists that all action by state *Court* and by him as *Executive,* is beyond review here under the Constitution of the United States. The language he quotes at page 9 was mere dictum, without any control over the actual decision

in that Brinkerhoff-Faris case. The State's Attorney mentions these additional cases:

Bristow Battery Company v. *Board of Commissioners of Rogers County Oklahoma;* 37 F 2d 504; which was a bill to enjoin suit on bonds.

Central Land Co. v. *Laidley* 159 U. S. 103; (where Justice Field dissented)

Patterson v. *Colorado* 205 U. S. 454; (where two justices dissented)

Bacon v. *Texas;* 163 U. S. 207 which was decided more from fifty years ago.
1896.

O'Neill v. *Northern Colorado Irrigation Company* 242 U. S. 20.

Winston challenges those cases as now overruled and abandoned. We now mention the later cases.

Recent Decisions by This Court.

In *Erie Railroad* v. *Tompkins* 304 U. S. 64 (mentioned at page 9 of the Answer by State's Attorney) this Court overruled *Swift* v. *Tyson* and a century of practice and decisions, and ruled that state court decisions are within your *power to review,* just the same as state legislation. By the recent real estate restrictive covenant cases, *Shelley v. Kraemer* 334 U. S. 836 at 842 ff, your Honors repeated and extended that ruling in favor of general jurisdiction vested in this court by the Constitution. Even the rules and resolutions of state school boards may be stricken down by this court as wrongful state action and discrimination. *West Virginia State Board of Education et al* v. *Barnette et al*: 319 U. S. 624 at 637 ff, 63 Sct. 1178 at 1185.

When reversing Texas Courts your Honors have said:

"Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system it that its safeguards extend to all—the least deserving as well as the most virtuous."

Hill v. *Texas* 316 U. S. 400 at 406 62 Sct. 1159 at 1162.

"Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue."

Bowles v. *Willingham* 321 U. S. 503 at 515 64 S ct. 641 at 647.

Where after services to the public have been rendered, the Congress as a legislative body forbade payment for those services because they disapproved the persons who performed them, and the congress defied the executive authority, this court has ruled that such conduct by the legislative body was void under the constitution, because it is ex post facto and like a bill of attainder.

United States v. *Lovett,* 328 US 303 at 314 ff.

Since the legislature may not defy the executive which has acted by authority, so in the case at bar, the State's Attorney and the Illinois Courts have no power under the Constitution to defy the legislative body, the Board of County Commissioners of Cook County. This court has ruled that legislative bodies are as much the guardians of the rights and liberties of the people, as the courts ever are. The legislative body may act directly or may entrust an agent or employee with power to act.

Perkins v. *Lukens Steel Company,* 310 US 113 at 129 ff. 60 S. Ct. 869 at 878.

Winston is Defending Against Information in Equity

By pleading and brief the State's Attorney as an executive asserts that he has power to refuse payment to a citizen after the legal services are performed under an employment made by a legislative body under direct provision of the Constitution of Illinois. If that be not arrogant despotism, we do not know how to state it nor where it may be found. The Answer is a flippant denial of republican form of government, to which all citizens are entitled by the Constitution.

> "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice. (citing cases). It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to the accused 'the assistance of counsel for his defense'. By virtue of that provision, counsel must be furnished to an indigent defendant prosecuted in the federal court, whatever the circumstances. (citing cases). • • • But due process of law in order to be 'due' does require that a State give a defendant ample opportunity to meet an accusation. • • • Such need may exist whether an accused contests a charge against him or pleads guilty."
>
> *Foster* v. *People of Illinois,* 332 US. 134 at 136 67 S. Ct. 1716 at 1717.

What Winston Claims: See [illegible] 35-48

Petitioner Winston claims a denial of his basic rights rights, contrary to the Constitutions of Illinois and of the United States, by a course of conduct for fifteen years by the State's Attorney of Cook County, which continues by permission of the courts of Illinois, without any hearing on the facts, nor any day in court for your Petitioner. Also

the public records of Cook County show that after this suit was begun, the tax foreclosure suits and decrees that were conducted and approved, since then by the State's Attorney, have caused to be lost and written off, more than fifty million dollars of real estate taxes that were collectible by those suits which Winston had filed and was pursuing as pending litigation, when he was stopped by the State's Attorney by force of this suit.

Winston urges that such action by the State's Attorney, is an usurpation of legislative and governmental powers which are vested by the Constitution of Illinois, as established by his pleading and Petition, exclusively in the Board of County Commissioners of Cook County. That Board has not authorized nor approved this suit against Winston but has disapproved all action by the State's Attorney.

Winston insists that the State's Attorney of Cook County, unjustifiably has used the powers of his office, by personal discrimination that he began after legal services were rendered and completed by Winston as a member of the legal profession. That discrimination will deprive Petitioner of his vested civil rights. After the County Board approved the legal services and work of Winston, that was completed pursuant to legislation and authority granted to Winston by the Board of County Commissioners of Cook County, this arbitrary discrimination was begun by the new State's Attorney for Cook County (Tr. 12, 19 and 26).

The Answer by State's Attorney is Evasive.

The State's Attorney also cites these cases at page 10: *Bradwell* v. *The State of Illinois*, 16 Wall 130; where Mrs. Bradwell was denied a license to practice law because she was a woman.

Ayres v. *Hadaway*, 303 Mich. 589; which was a disbarment proceeding.

In re Thatcher, 190 Fed. 969; which denied a writ of prohibition that was sought in the federal courts to enjoin a disbarment proceeding and orders by the state courts.

Emmons v. *Smitt*, 58 FS 869—149 F2d 969; which dismissed suit for writ of prohibition and summary judgment in the federal courts, which sought to enjoin and prevent a disbarment proceeding.

None of these cases involved any *ex post facto* and retroactive rulings upon pleadings about fees earned and vested as a property right; which is the fact of record in the case at bar. By his answer the States Attorney has established unwillingness to discuss our petition.

An example is the treatment of the question of Petitioner's right to be paid for services rendered in his professional work. Respondent assumes a question of the right to practice law instead of answering Petitioner's claim that having rendered services in his profession he cannot be deprived of his right to compensation.

The nonchalant manner in which Respondent attempts to ignore Petitioner's point indicates the attitude which has prevailed throughout the conduct of State's Attorney.

It is noteworthy that at the bottom of Page 2 of Respondent's brief, a separate paragraph has been inserted that Respondents mention only broad general propositions.

The State's Attorney blithely ignores citations made and discussed by Winston at pages 23 and 50 of petition for certiorari. It is sufficient to quote from one decision made by Supreme Court of Illinois.

Compensation Earned by Winston is Property.

"The right to follow the professions is one of the fundamental rights of citizenship. A person's business, profession or occupation, is property within the meaning of the constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness. *People* v. *Love,* 298 Ill. 304."

Lasdon v. *Hallihan,* 377 Ill. 187 at 195 (pages 23 and 50 of Petition).

The merely bald statements by State's Attorney at page 5 of Answer, that the constitutional questions raised by petitioner are not substantial, is only statement, which he does not support. The Answer is indirect and evasive. It refuses to discuss the detailed analysis, which Winston has made by his petition, and now asserts anew. That failure by State's Attorney is admission that the petition is true. Compare the Winston record tr. 35-48.

The State's Attorney made a motion in this case before the Supreme Court of Illinois, to dismiss the appeal, for the reason that:

"The appeal of said Edward M. Winston is frivolous and without merit." That motion was overruled and denied by the Supreme Court of Illinois.

If such a motion had been made before this court, a sufficient answer would be what Your Honors said in denying a like motion made in the case of People of Illinois Ex Rel McCollum v Board of Education 333 U. S. 203: 68 SCt 461 at 463. Basic constitutional issues were presented for decision before the Supreme Court of Illinois, by your Petitioner and are preserved by the Record.

Conclusion Summary

Reference is made again to the record facts mentioned at page 3 and 48 of Petition. The State's Attorney continues to approve budgets to employ outside private attorneys to conduct county legal affairs. But if the Winston rulings stand, the State's Attorney can always refuse to pay anyone at his mere whim, after the legal services are completed.

Thereby the State's Attorney admits as true the statements made at page 22 of our Petition, that the State's Attorney seeks to have paramount and arbitrary power, without review by this Court.

Winston renews the prayers of his Petition and urges that your Writ be issued, that the record be reviewed, and that the decree and orders by Illinois Courts shall be reversed: and that he may have a day in court.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Edward M. Winston.

SUBJECT INDEX.

Table of Cases Cited.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The historical background of appellate review of this case is best described in words of the Supreme Court of Illinois when it said in the case of *People* v. *Winston*, 399 Ill. 311, at page 312:

"This cause is now before us for the third time. The decisions upon the two former occasions are re-

ported in *People ex rel Courtney* v. *Ashton*, 358 Ill. 146, and *Ashton* v. *County of Cook*, 384 Ill. 287."

Jurisdiction.

Petitioner invokes the *certiorari* provisions of Section 237(b) of the Judicial Code (Title 28, U. S. C. A., Sec. 344).

Respondents resist the petition on the following grounds:

1. The Federal constitutional questions sought to be presented are *not* substantial.

2. The Fourteenth Amendment of the Constitution of the United States does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions.

3. The judgment or judgments sought to be reviewed are based upon non-Federal grounds adequate to support it, or them.

4. Want of Federal question.

In order to facilitate consideration of the aforesaid points, the respondents have hereinafter argued three broad general propositions in support thereof. But, by this course of action we do **NOT** waive any of those specific individual objections to the petition.

STATEMENT OF FACTS.

Examination of the full opinion recorded in 384 Ill. 287 (Petition, page 52) reveals that a bare terse statement was ruthlessly exterpetated from that judgment and quoted by petitioner as an admission by the Supreme Court of Illinois of alleged "arbitrary action *ex post facto.*" Therefore, we unqualifiedly deny any such alleged admission.

The brief of the petitioner recites in several places that "there has never been any trial by evidence" in this record. Suffice to say that if there were any merit to such contention it is readily dissolved by the following statements (obviously inconsistent therewith) made by petitioner. At the top of page 11, in the petition, we find, "Said Winston abided his said answer and counterclaim, (Tr. 22)". This legal position and action of petitioner was duly noted in the opinion reported in 399 Illinois 311 (page 66 of Petition), where it appears at page 67 of the petition, as follows:

> "Winston elected to stand by his pleading and thereupon final judgment was entered, * * *."

The identical position was taken by the petitioner in the second appeal (384 Ill. 283, page 52 of the Petition), as it appears from that opinion (page 57 of the Petition), as follows:

> "The State's Attorney's motion to strike Winston's answer and counterclaim was sustained *and Winston elected to stand by his pleading*, whereupon final judgment was entered against him." (Italics added.)

Petitioner has been a lawyer for many years, by his own statement, therefore, the advisability and possible

consequential results of abiding by an answer and pursuing that course of action should have been well known to him, if the argument regarding lack of trial of evidence is of any great moment.

The record, as well as the opinions, are utterly devoid of anything pertaining to petitioner's license to practice law. His privilege of practicing law was not in issue either directly or indirectly at any time, and still remains valid and wholly unaffected.

ARGUMENT.

I.

Petitioner's alleged constitutional questions are without the slightest substance.

The judgments sought to be reversed are each based upon a non-federal ground adequate to support them. Furthermore, there are no true federal questions involved here, and alleged federal constitutional questions, sought to be presented are not substantial. Examination of the pseudo questions asserted, reveal that they have no real or necessary relation to the decision of this case. There is an utter paucity of the requisite meritorious jurisdictional statements to bring the instant cause before this tribunal on review.

Studied examination of the petition fails to disclose any issue of such intrinsic importance upon which a declaration of law is now required for its most authoritative determination. Nothing in the instant petition requires this Court to intervene to quiet any conflict which it alone can compose, for there is no true conflict presented.

II.

The Fourtenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions.

The gist of the petition appears to be that the Supreme Court of Illinois allegedly departed from established law and thus deprived the petitioner of "due process of

law and equal protection of the law." We do not, and cannot agree with the theory of the petitioner's case.

Nor do we by answering this line of argument concede, for a moment, that the Supreme Court of Illinois departed from established law. For that is not the basis of the judgments here complained of. However, if there were any merit to petitioner's theory, which respondents deny, the following cases go far toward cutting the ground beneath Winston's basic position:

In *Bristow Battery Co.* v. *Board of Commissioners of Rogers County, Okl.*, 37 F. (2d) 504 at pages 507 to 508 the court there said:

"Moreover, conceding, without deciding that the State Supreme Court departed from and changed the prior established rule in that State in all of the respects claimed by appellee in its ruling in the *Bristow Battery Co.* and *Eaton Cases,* that fact, if it be a fact, does not present a Federal question. Even if appellee had been a party in the two causes in the State Supreme Court the rulings of the court in those cases would not have deprived it of its property without due process, much less can that claim be sustained under the facts stated." "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the constitution of the United States." *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112, 16 S. Ct. 80, 83, 40 L. Ed. 91. In *Patterson* v. *Colorado,* 205 U. S. 454, 460, 461, 27 S. Ct. 556, 557, 51 L. Ed. 879, 10 Ann. Cas. 689, we find this:

> "It is argued that the decisions criticized, and in some degree that in the present case, were contrary to well-settled previous adjudications, of the same

court, and this allegation is regarded as giving some sort of constitutional right to the plaintiff in error. * * * Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because the earlier decisions are reversed." And at page 459 of 205 U. S., 27 S. Ct. 557:

"The requirement in the 14th Amendment of due process of law does not take up the special provisions of the state Constitution and laws into the 14th Amendment for the purposes of the case, and in that way subject a state decision that they have been complied with to revision by this court." In *Tracey* v. *Ginzberg*, 205 U. S. 170, 27 S. Ct. 461, 463, 51 L. Ed. 755, the court said:

"The Fourteenth Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty."

In *Bacon* v. *Texas*, 163 U. S. 207, 16 S. Ct. 1023, 1029, 41 L. Ed. 132, Section 10 of Article 1, U. S. Constitution, was under consideration. After noting that in suits brought on negotiable bonds in a United States court the Supreme Court on appeal therefrom would give effect

to decision of the State court rendered prior to the issuance of the bonds rather than to later decisions changing the prior ruling in said State court, then said:

> "This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court. In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract."

Along similar lines is the ruling in *Patterson* v. *Colorado,* 27 S. Ct. 556, 205 U. S. 454, 51 L. Ed. 879, where it was said, "In general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not any infraction of this Amendment merely because it is wrong or because earlier decisions are reversed." The court was there referring to the Fourteenth Amendment.

The case of *O'Neil* v. *Northern Colorado Irrigation Co.,* 37 S. Ct. 7, 242 U. S. 20, 61 L. Ed. 123, stands for the proposition that something more than a mere departure from a rule of property established by prior decisions would have to be shown before a party could be held to have been deprived of property without due process of law.

Reaching, what is perhaps the basic question in issue here, the opinion in *Emmons* v. *Smitt,* 58 F. Supp. 869, contains the following on page 876: "Is failure on the part of the Supreme Court of the state to follow its own

decisions according to the way we might interpret them violation of a litigant's constitutional rights? *We think not.*" (Italics added) Citing *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

In the case of *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, at page 680, this Court said:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; *and that the mere fact a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer Appellate jurisdiction on this court.*" (Italics added.)

This emphasized phraseology is supported by a long line of cases cited in the opinion. The foregoing quotation is presented solely for the proposition that *even if* the Illinois Supreme Court overruled principles or doctrines established by previous decisions, petitioner would still be without a meritorious contention or position before this Court.

III.

The right to practice law is not a Property Right and is not involved in this case, in any event.

This Court, in clear unequivocal phraseology ruled that "the right to practice law is not a property right" in *Emmons* v. *Smitt, et al.*, 58 F. Supp. 869, 874.

The rule of law is quite clear that the right to practice law is not secured by the constitution, nor by any

law of the United States, such right is a privilege. *Emmons* v. *Smitt,* 149 F. 2d. 869; *Bradwell* v. *State of Illinois,* 16 Wall. 130, 21 L. Ed. 442; *In re Lockwood,* 159 U. S. 116, 14 S. Ct. 1082; *In re Thatcher,* 190 Fed. 969, 975; *Ayres* v. *Hadaway,* 303 Mich. 589, 6 N. W. 2d. 905.

There is nothing whatever, in the proceedings had below, which tend either directly or indirectly to hamper petitioner in the practice of his profession, or to prevent him from so doing.

The aforesaid proposition is discussed, in this brief solely to indicate that petitioner's basic premise on this facet of the case is unsound. This, for the manifest reason that denial of counsel fees does not and cannot eradicate his license, nor impair the same.

Furthermore, predicated upon the authorities cited, under this proposition III, respondents deny that petitioner has a "vested right" as urged in his petition.

Summary.

We look to Winston's "prayer for relief" in an effort to ascertain a summarization of his position. Petitioner, there, urges he did not receive due process of law nor equal protection of the law, in the Courts of the State of Illinois. With reference to the contention of lack of due process we say that due process of law requires only the opportunity to be heard and that the petitioner has had ample opportunity; has fully presented his claims and was ruled against. The Supreme Court of Illinois wrote comprehensive and exhaustive opinions in all three appeals, hence urging denial of equal protection of the law is readily and properly countered by the obvious—the alleged infringement is not genuine but merely an illusory argument.

Conclusion.

It is therefore respectfully submitted that this case is not a proper one for review by *certiorari* in this Court, and that the petition for writ of *certiorari* should be denied.

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